THE
MODERN LAW REVIEW

Volume 11 January 1948 No. 1

THE STATE AND THE LAW

An Address to the Haldane Society by The Rt. Hon. Sir Hartley Shawcross, K.C., M.P., Attorney-General.

When I was reminded of the title of the subject on which, so your Secretary alleged, I had promised to talk to you, I felt sure that there must be some mistake. Surely the word ' and ' ought to have been ' of '. I could talk at some length about the state *of* the law. About the shocking condition of the Statute Book and the need for codification and consolidation; about various measures of law reform which we are considering for introduction when Parliamentary time permits. And I could animadvert in some detail in regard to the position of our case law, although I have no doubt I should get into hot water if I did. But I think that some day we shall have to consider whether it would not be a useful thing only to report the decisions of the Court of Appeal and the House of Lords. Although the danger is not nearly so great in this country as it has become in the United States, the number of reported cases is alarming: it leads to us all searching feverishly for some long-forgotten decision in a case which appears superficially to bear some resemblance to the one on which we are engaged. If you are sufficiently diligent, it is possible to find, in the jungle and wilderness which has been said to characterise some branches of our law, an authority for almost any proposition that you like to put up. But, as Lord Dunedin said, the mere citation of authorities is inimical to clear thought, and I always remember with affection, if I do not always practise, the lesson Mr. Justice Swift taught me—and I learnt many lessons at his feet, not all repeatable now—when he saw me arrive, armed with a large number of reports, and said : ' Mr. Shawcross, which of those twenty-five volumes contains your best case? Read it to me, for I shall not listen to any other '.

I am to talk on the State *and* the law. That is a pretty wide subject. I want in the main to deal with one aspect of it, and that is the growing intervention of the Executive in matters which some people consider more appropriate for the Legislature or for the courts. Now I am, myself—and in all this I am expressing a purely personal view—not very much attached to any particular dogma about what the constitutionalists call the separation of powers. Whilst I have due reverence and respect for the law, I start from the proposition to which I think all Socialist lawyers must subscribe, that the State and the law are made for man. And I want to

see such a relationship between the State and the law, or, more accurately, I should say between the Executive, the Legislature and the Courts, as will promote the interests of the individual, not by protecting the privileges of the few to the disadvantages of the many, but by advancing the greatest good of the greatest number with the minimum of interference which, consistently with that, needs to be put on the activities and liberties of individuals. Now there was a time when I was greatly impressed with the fears which, twenty years or more ago, some of our profession, associated then in a most unusual alliance with some of the professors, were expressing about what they called the new despotism, and what was then regarded as the rising tide of bureaucracy. It is a curious vocabulary. The despotism was neither despotic nor new. As for bureaucracy, I never quite understood why it was that the business man who, whilst serving in the employment of some joint stock company, was always regarded as concerned only with promoting the welfare of the little man, became instantly, if he ever entered the civil service of his country, a bureaucrat whose one aim in life was to bury the little man under masses of orders and regulations and what not. But, all the same, I was brought up on the pure milk of Dicey, and I was inclined to regard the constitution of this country as based fundamentally on the idea that, although there was an executive somewhere in the background, dealing with more or less routine matters, the rule of law depended on the omnipotent control of the Legislature over the formation and enactment of policy, and on the control of the independent Judiciary over the administration of what Parliament enacted. In truth, of course, the doctrine or dogma of a complete separation of powers never really applied to our constitution. Those who think that the present activity of the Executive and its encroachment into what, on the one hand may be regarded as the field of the Legislature, and on the other as the territory of the Judiciary, is some new thing, the invention of malevolent Socialists, would do well to remember what Maitland said about it sixty years ago or more:—

> 'It is curious that some political theorists should have seen their favourite ideal, a complete separation of administration from judicature, realised in England—in England of all places in the world, where the two have for ages been inextricably blended. The mistake comes of looking just at the surface and the showy parts of the constitution'.

Now I am not going into the remote history of the matter, but after the Industrial Revolution, the gradual disappearance of the doctrine of laissez faire necessitated the development of more elaborate and effective organs of government, and resulted in the intervention of the State in an increasingly wide field of social activity. By the time the *Arlidge Case* came before the House of Lords in 1915, it was well recognised in the Supreme Tribunal that the whole trend of legislation was to sacrifice the rights of the few

in order to improve the position of the many, and that at the same time the Executive was undertaking functions which might hitherto have seemed more appropriate for the Judiciary. Thus the Lord Chancellor of the time was saying:

> 'There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is his own. Such rights are not to be affected unless Parliament has said so. But Parliament, in what it considers higher interests than those of the individual, has so often interfered with such rights on other occasions, that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is today'.

And that great judge, Lord Shaw, was saying this:

> 'But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded . . . in so far as the term "natural justice" means that a result or process should be just, it is a harmless, though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale, it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous'.

The point I am emphasising is that by that time, certainly by the end of the 1914–1918 war, it had become very obvious that the necessity for strong government was accompanied by the need for a civil service experienced in the technique both of preparing legislation for submission to Parliament, and of administering such legislation when its principles were enacted. Indeed, that had been realised from the time of the Liberal administration in 1906, and if anything was required to confirm it, the last war did so. Even the most bitter opponents of delegated legislation and of executive powers realised that in time of war at least, a great concentration of power in the hands of the Executive is necessary. The intervention of the State becomes, no doubt, less urgent and necessary in more normal times, but what was essential in time of war, does not become constitutionally wrong in time of peace. The fact is, that there is and never has been any clear-cut demarcation or division of powers in our constitution between the Legislature, the Executive and the Judiciary; you cannot confine the powers of a unitary State in separate watertight compartments, and the extent to which you give power to one or other of these three elements in our constitution depends entirely on convenience and expediency in the circumstances of the time. No doubt if it was desirable or possible—and no one nowadays thinks that it is either—to return to the full doctrine of laissez faire, you would increase the influence of the Judiciary and diminish that of the Legislature and the Executive.

If, on the other hand, you accept the view that the economic and social circumstances of our time necessitate increased intervention by the State, the provision of services—health, education, insurance and so on, and the regulation of trade and industry, it follows that you must—I do not for a moment say reduce the power of the Legislature, but somewhat alter its exercise, and that you must increasingly submit the administration of the legislation which is passed to expert tribunals which are outside the hierarchy of the ordinary courts of law. Take first the position of the Legislature. Its function is less and less the actual initiation and detailed examination of legislation: its power is exercised, and very strongly and usefully exercised, rather in the direction of discussing the principles of each legislative enactment, the shape of which has often been greatly influenced, if not initiated, by the accumulated experience of the Executive, the Legislature retaining a veto over the way in which its details are worked out, and controlling the Executive in its administration. I am far from belittling what Parliament can do in the matter of detailed examination of Bills, but with the long and complex measures which present circumstances require the whole Parliamentary system would break down unless one had occasional use of the closure and increasing use of delegated legislation. An example of the necessity for the closure occurred in the case of the Transport Bill. In the Commons we spent 120 hours on that Bill. If Members of Parliament had imposed a self-denying ordinance upon themselves, with, say, only two speeches on each side for each amendment, that should have provided adequate time. But as it was, if we had continued our discussions at the rate at which we progressed, without the closure, discussing the first four clauses, we should have been debating that Bill for two and a half years in Committee.

Obviously, where you have a measure which the Government of the day consider urgent, you cannot allow its introduction to be delayed by unduly prolonged discussion in Parliament. We may be right or wrong about it; we consider we are right and that these measures for the public control of industry and so on are urgent. Parliament thinks that they are. If they are, they must be got through with reasonable expedition. One of the criticisms which the totalitarians make of the institutions of democracy is that they are too cumbrous and slow. Parliamentary democracy, if it is to survive, must adapt itself to the needs of active and strong government in periods of industrial and social change. Fortunately, the closure is rarely necessary. The other method by which Parliament does adapt itself is by increasing delegation of its powers. Provided Parliament exercises a proper scrutiny over the orders and regulations which are passed (and we proceed rather empirically on this, I dare say that as we go on we may improve our machinery for Parliamentary supervision and control), I see no danger in that. The orders are drafted by people who acquire a great deal of expert

knowledge, and the order-making power provides for a far more flexible and powerful administrative machine than if the full details of each measure had to be worked out in advance and incorporated in the original Bill. *Solvitur ambulando* is a useful principle in regard to the administrative problems which will arise in the application of these new Bills. The Indian Independence Act is, no doubt, a very exceptional case, but it provides a good example of legislation that would have been utterly impossible if it had sought to do more than provide a framework within which full powers were delegated. I know that some learned people have occupied their time collecting examples of bad orders, incorrectly drafted or producing unintended results. With the many thousands of orders made each year, it is not difficult to do that, and for those who have nothing better to do, it is great fun. I would undertake that if you examined all the decisions of the courts—and remember that we require two appellate stages to keep the law right—you would find proportionately the same number of remarkable judicial decisions. But you do not condemn the Judiciary for that, nor do those who take an objective view condemn the practice of delegating wide legislative powers because it is sometimes inefficiently exercised. In the case of the bad judicial decision you may say the Court of Appeal provides a check, but what is the check on the proper administration of delegated legislation?

There is the judicial check. It is true that the judicial check is progressively diminishing. That is a thing about which it is difficult for lawyers to take an objective view, but Parliament has felt that there are good reasons for taking the administration of certain classes of legislation more and more outside the province of the ordinary courts and placing it in the hands of expert tribunals. It is not much use railing at the Executive for that, for it is Parliament which, in its wisdom, has thought it right to adopt this policy. Nor is it a policy of the Socialist Parliament only. Over the past score of years, there has been an increasing tendency to strengthen the Executive as against the courts. There are two main reasons for that. The first is that administration in the interest of the many cannot be held up indefinitely whilst the rights of a few individuals are being litigated right through the hierarchy of courts. If a clearance order, or a compulsory purchase order, or an order designating an area for one purpose or another under the Town Planning Acts—to take one class of case—is made, it is done because a Minister responsible to Parliament considers it in the public interest so to do.

It may be observed in passing that when a Ministerial inquiry has been held into an important case, the report of it, fully minuted, together with the shorthand note (which is usually, though not always, taken) is given to the Minister, who takes a personal decision on it. It is a popular illusion that decisions on such matters, *e.g.*,

town planning schemes, are taken not by the Minister himself, but by some anonymous civil servant.

Of course, there will be individuals who object, and who, if they see some way of quashing the order, will take any legal points open to them to get it quashed. I do not complain of that: that is their right. But the legal proceedings themselves may take the best part of a year to be decided. And at the end, if the order is finally quashed on some technical ground, the whole process may have to be gone through again. There is often and inevitably an excessive legalism and technicality in dealing with these matters. Lawyers use all their skill and ingenuity in order to find some flaw in the procedure. That is their job. That sort of things leads to a certain jealousy of the courts by Parliament, and the result has been that in each succeeding Bill powers tend to be placed more and more exclusively in the hands of Ministers. The real sanction against abuse is the political sanction. The powers of Ministers are to be exercised in the public interest. The courts have neither the information nor the desire to settle these questions of general public interest. That is political, and that is for Parliament, which can and does call Ministers to account. Further, there is adequate Parliamentary control over Ministerial orders from their inception, in that they are subjected to Parliamentary scrutiny as soon as they are made. When an order involves some new principle, it is the practice to provide that it shall not come into force until it has lain on the table of the House for forty days of Parliamentary sitting, and has then been the subject of an affirmative prayer that it be approved. When no new principle is involved, or in cases of urgency, the practice is to provide for the order to come into force immediately, but subject to it lying on the table of the House for forty days, during which time it may, upon a negative prayer, be revoked. But it is not only the delays and uncertainties of ordinary court procedure which has sometimes resulted in Parliament preferring administrative tribunals. I confess that when it was first proposed to remove Workmen's Compensation from the courts, I was a bit apprehensive about it. But I could not shut my eyes to the fact that the representatives of the workmen, the trade unions with enormous experience, were, on the whole, in favour of it. And when I look at the enormous number of reported decisions in Butterworth I am forced to the conclusion that possibly expert tribunals, working under central direction, may, even though not assisted by professional advocates,[1] on the whole achieve equally just results far more cheaply, with far greater expedition, and with greater certainty. The atmosphere of waiting for a decision of the House of Lords, or wondering what decision on the same point

[1] The subject of professional representation of parties before tribunals is a vexed one; the intention is to avoid complication of the proceedings and a litigious atmosphere, and to prevent unfairness to ordinary people by letting the tribunal get overpowered by a rich party briefing a fashionable 'silk'.

another county court is coming to (familiar to any Workmen's Compensation practitioner) will disappear. And after all, the function of the English court is not to arrive at absolute truth, absolute justice. As Maitland has said, the behaviour which is expected of the judge in different ages and by different systems of law fluctuates between two poles :

> 'At one of these is the conduct of the man of science who is making researches in his laboratory, and will use all appropriate methods for the solution of problems and the discovery of truth: at the other stands the umpire of our English games, who is there not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed '.

We sit in court not to discover absolute truth, but in order to answer the question 'How's that?' We try cases on the evidence which the parties adduce. It is not for the judge to probe further. The administrative tribunal is not always so restricted. I think we have got to face the possibility that where you have, say, new policies of social improvement to be carried out by central or local government agencies, where you are seeking rapidly to create new standards in a new field, where you want to secure consistency of decision over the whole country together with expedition, cheapness and finality, administrative tribunals developing a great expertise in their particular fields, may function as efficiently as the ordinary courts. At all events, Parliament is obviously of the view, as also are many distinguished lawyers, that many disputes arising from the incursion of the State into the industrial, social and planning fields are entirely unsuited to decision by the ordinary forms of law, partly because of the number of cases to be decided, partly because of the expert knowledge required to decide them, partly for the other reasons I have indicated. And one might add that the reasons which have led the trading community to avoid—to an extent unparalleled in any other country—the ordinary machinery of the law have not been without their effect on the growth of administrative law.

It cannot be over-emphasised that in proceedings of the class we are considering, the tribunal is not concerned to settle a dispute between private individuals, but to see how a policy, decided on by Parliament, can be carried into effect, securing the greatest good for the greatest number, while doing the least injustice to the fewest.

This is, I think, clear : administrative law and delegated legislation have come to stay. There are many improvements which may be made in the system: in the nature and composition [2] of the

[2] In many of the new tribunals, lay people can function as well as can lawyers. For example, any layman with common sense and local knowledge is as well, often better, able to say what is a proper rent for a furnished house than is the most learned and astute lawyer.

administrative tribunals: in the Parliamentary checks over delegated legislation. But I utterly repudiate the view that, taken by and large, the present system has worked injustice or threatens our liberties. On the contrary, I believe that the methods we are using now have protected the fundamental principles of our constitution from a breakdown which would, in some measure, have paved the way for some totalitarian system.

In this connection it is worth remembering the discussion on French administrative tribunals which took place at the Anglo-French Legal Conference recently convened by the Law Society. It has been the custom in this country to look with horror on French *droit administratif*, and to jeer at all French courts. But I think we should do well, before being horrified or jeering, to see if there is nothing we can learn from the French system.

It is very easy to jeer and jibe at the civil servants: they cannot answer back. But, after close association with them at all levels during the past seven years, I am convinced not only of their probity, as we all are, of their ability, of their devotion to what is often exceedingly arduous duty, but of their keen sense of fair play and justice. Whilst we have those administrators, whilst we have a Parliament freely elected, and Ministers answerable to it for what they do, I do not myself think that we have anything to fear from the way in which our pliable constitutional machinery readapts itself to the changing circumstances of these revolutionary times. And, after all, it is a little significant that at this very time, in spite of the congestion of the Parliamentary machine, we have overcome all the doubts and hesitations which have delayed action hitherto and taken steps to make the Crown as accessible a defendant under the ordinary law of contract and of tort as the subject is. We are seeking to open the doors of the courts wide to the little man in the ordinary claims of everyday life. And we are seeking, by our legislative and administrative machinery, to ensure that the collective interests and individual rights of the little man are not delayed or tarried by those whose vested interests would seek to use the processes of the courts in order to obstruct the implementation of those laws which it is the policy of Parliament to enact.

A RE-EXAMINATION OF THE DUTY OF CARE[1]

I

THE TORT OF NEGLIGENCE AFTER WOODS *v.* DUNCAN

THE recent case of *Woods* v. *Duncan*[2] raises anew certain fundamental problems of the tort of negligence, and renders it necessary once more to examine the nature of the matters which must be proved to sustain an action of this kind. For one effect of *Woods* v. *Duncan* is to re-emphasise that although the nature of the elements of an action of negligence has been canvassed in a multitude of cases, and although negligence problems are in the forefront of the court's day-to-day work, no settled method of analysis of such problems has been reached by the courts.[3] The rather dramatic facts of *Woods* v. *Duncan*, arising from the tragic loss of H.M. submarine *Thetis*, are sufficiently well known. They need not be canvassed here again since the writer is not concerned with the merits of the holdings, or of the reasons contained in the judgments and speeches to which the litigation gave rise. The present interest lies only in the diversity of the reasons given

[1] The present article sprang from the important and challenging treatment of this question contained in Chapter VII of Professor Julius Stone's recent work *The Province and Function of Law*. The writer had the benefit of Professor Stone's invaluable assistance at every stage of its preparation. This assistance so unstintingly given took forms too numerous to set out, but in particular the writer must acknowledge his indebtedness to Professor Stone for many hours of stimulating discussion, and for revision of the drafts, which resulted in many points being added.

[2] (1946), 62 T.L.R. 283.

[3] The duty problem has been the subject of keen juristic interest in recent years, but scarcely on a scale warranted by its day-to-day importance. The writer has found much of value in P. H. Winfield, 'Duty in Tortious Negligence' (1934), 34 Col.L.Rev. 41 (on the historical development of 'Duty' notions in negligence, and the function of Lord Atkin's test); and L. Green, 'The Duty Problem in Negligence Cases' (1928), 28 Col.L.Rev. 1014; (1929), 29 Col.L.Rev. 250 (on the judging and language techniques involved in adequate fulfilment of the courts' creative function of determining whether a duty (in what has later come to be known as Lord Atkin's sense) exists in a novel situation).

See also generally, Glanville Williams, 'Negligent Contractors and Third Parties' (1942), 92 L.J.Newsp. 115, 124, 132, and F. C. Underhay, 'Manufacturers' Liability' (1936), 14 Can.Bar.Rev. 283, on the development of the British case law since *Donoghue* v. *Stevenson*, and *Grant* v. *Australian Knitting Mills*. Other references will be found in later footnotes; as far as the writer is aware, however, the precise questions at the centre of the present article have not previously been considered at length.

by some members of the House of Lords for arriving at an agreed conclusion concerning an agreed state of facts. For in this regard the speeches in *Woods* v. *Duncan* carry into the tribunal of last resort the diversity of analyses long current in the courts.

Viscount Simon stated [4] that three things had to be proved for an action in negligence :—(1) that the defendant failed to exercise due care; (2) that the defendant owed to the injured man a duty to exercise due care; (3) that the defendant's failure was the 'cause' of the injury in the proper sense of that term. His Lordship then proceeded to satisfy himself that in the case before the court the first two requirements had been met and finally approached what he described as the crucial question whether Cammell Laird's negligence could be said to be the 'cause' of the disaster.[5] In this connection he asked :

> Could Cammell Laird reasonably have in contemplation—the phrase is Lord Atkin's in *Donoghue* v. *Stevenson* —that those on board when the trial dive was taking place would be put in mortal peril if those holes were blocked?

Having answered this question in the negative he dismissed the plaintiff's claim.

In the same case Lord Russell of Killowen stated, in the course of his speech, that assuming that Cammell Laird were negligent and that their negligence caused the accident, the question would still remain whether they were in breach of a duty owed to Duncan and Craven. 'The answer to this question depends on whether they could reasonably be expected to foresee that the choking of the test-cock might endanger the lives of those on board, or cause the event which happened. In my opinion no such foresight could reasonably be expected of them'.[6]

Both these law Lords therefore based their decision on the same ground of fact, namely that Cammell Laird could not reasonably have foreseen the accident. Yet the grounds of law were quite different. Viscount Simon, as we have just seen, thought that this involved that although the defendant *was* under a duty of care to the plaintiff, and although the defendant *had been* negligent, yet the defendant's negligence was not the cause of the accident. Lord Russell of Killowen, on the other hand, thought that the result was that although the

[4] At p. 286.
[5] P. 287.
[6] P. 288.

defendant might have been negligent and that negligence might have caused the accident, yet he was under no duty of care in respect of that matter.

Lord Porter's approach was different again. He was prepared to acknowledge that a duty of care existed, and also was inclined to think that the blocked test-cock was *a* cause of the accident, and he was of opinion that 'that is enough if the cause in question was a direct one'.[7] Yet, despite all this, Lord Porter thought that the action failed, his ground being that the defendants had not been guilty of negligence towards the plaintiffs. When we seek the precise meaning of this it is apparently again because they could not reasonably have foreseen that the accident would ensue from the blocking of the test-cock. Thus he said[8]:

> But negligence in failing properly to paint a ship is not necessarily negligence towards all or any of those on board her. The two companies, no doubt, owed a duty to ratings and civilians, but would only be guilty of want of care towards them if the act or commission complained of would reasonably be anticipated as likely to cause them harm. No question of measure of damages arises here as arose in *Re Polemis and Furness Withy Company*, ([1921] 3 K.B. 560; 37 T.L.R. 940). Your Lordships are concerned with the earlier question whether these defendants were negligent towards the two men whose widows are making a claim—a question similar in character to that discussed in *Bourhill* v. *Young*, [1943] A.C. 92.[9] Ought, then, Cammell Laird or the Bitumastic Company to have anticipated that the blocking of the test-cock would be an element of danger to anyone on board the ship, and to these two men in particular? I think not.

Not only Viscount Simon, and Lord Russell of Killowen then, but Lord Porter as well, agreed that the action failed and that the fact which defeated the plaintiffs' claim against Cammell Laird was that these defendants ought not reasonably to have foreseen that their blocking of the test-cock would endanger the plaintiffs. From this fact, however, widely differing conclusions were reached as to the point in law at which the plaintiffs' claim broke down.

[7] P. 290.
[8] P. 291.
[9] Yet the law Lords in that case thought that they were dealing with the question whether the defendant owed a duty of care to the plaintiff.

II

THE MYSTERY OF THE DUTY OF CARE

So striking a divergence, in so eminent a tribunal, on such an everyday problem, makes urgent a thorough overhaul of the supposed nature of the elements of an action of negligence. The present article is intended as a contribution to the study of only one (though perhaps the most difficult) of these elements, namely, the requirement that the defendant should have been under a duty of care to the plaintiff in the particular circumstances of the case. It is universally recognised that this is one of the elements in an action of negligence, although when we ask what is meant by the assertion that there must be a duty of care we immediately enter the field of controversy.

Professor Stone, in his recent work on *The Province and Function of Law*,[10] challengingly posed the problem which inspired the present inquiry in the following passage:

> The nearest approach of the courts to a clear formulation of the criterion for deciding whether such a duty exists is perhaps that of Lord Atkin in *Donoghue* v. *Stevenson* ([1932] A.C. 562 at p. 580). He said that we owed a duty to persons in the position of 'neighbour' to us with regard to the subject-matter, and that all those were 'neighbours who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question'. A duty towards the plaintiff then means that the defendant ought reasonably to have him in contemplation as likely to be affected by the conduct in question, in short, the defendant ought reasonably to have anticipated injury to him. But is not that in any case one essential element of what is meant by the requirement of negligence itself? It remains necessary even today to repeat the almost fifty-year-old comment of the late Mr. Justice Holmes that the prerequirement of duty in the above sense is . . . tautologous with the definition of negligence itself.

Professor Stone raised a number of consequential questions. If, for instance, the duty concept is tautologous[11] with part of

[10] (1946), 181–82.

[11] The word tautology in this connection is not used to indicate an identity between subject and predicate of the same proposition, but an identity between what is predicated of the duty of care and part of what is predicated of negligence. In other words, where A is co-extensive with XY and C or part thereof is co-extensive with XY, A and C are, for the purposes of this discussion, tautologous.

that of negligence, how were we to explain the continued emphasis upon it in the cases? And, perhaps more important, what effect does its continued use by judges have upon the actual decisions which they reach? One explanation might be of course that Lord Atkin's account of the duty requirement may not have been universally accepted, and it might turn out that the duty concept is only tautologous with the negligence concept upon that view. The learned writer recognised this possibility when he suggested that in so far as tests are laid down other than foreseeability for ascertaining the range of the superimposed duty, it ceases to be tautologous with negligence.[12] These considerations point to the need of a re-examination of Lord Atkin's view, and of the possible alternatives which have been or may be applied, as the probable clue to the mystery of the duty of care.

III

THE ATKIN TEST OF DUTY OF CARE: SUPPORTING AUTHORITIES

Regarded as a rule of law, universally true, and capable of giving a result in the particular case by simple deduction from it, Lord Atkin's principle, as expressed in his speech in *Donoghue* v. *Stevenson*,[13] has received support from judicial language in numerous cases.

Outstanding is the decision of the House of Lords in *Bourhill* v. *Young*.[14] Lord Porter there used language which must surely indicate complete reliance on Lord Atkin's test.

Professor Stone has kindly assisted me with the following note: 'In *The Province and Function of Law* (1946, p. 182), I made a number of points. One was that there was a tautology between the negligence requirement and the duty requirement as defined by Lord Atkin. Further, insofar as courts, though finding negligence in a particular case, nevertheless hold that the defendant owes no duty, they cannot be drawing their conclusion from Lord Atkin's principle as properly applied. I concluded that the duty of care concept as applied by the courts permitted and required creative judicial activity. This is, as I understand it, the starting point of your present inquiry, though I am now of the view that the explanation arises not from any circuity in Lord Atkin's test, but from its tautology in the above sense with negligence, and from the currency of competing versions of *Donoghue* v. *Stevenson* as explained in the present article'.

Leon Green observed the triple tautology of certain versions of the duty, negligence and causation elements as long ago as 1928. See his 'The Duty Problem in Negligence Cases' (1928), 28 Col.L.Rev. 1014, 1029. He sought to explain the apparent anomaly as a device giving to the judge a preliminary check under the duty head to the jury's verdict under the negligence head. *Sed. qu.*

Cf. P. H. Winfield, *cit. supra* n. 3, esp. at 62–66.

12 J. Stone, *The Province and Function of Law* (1946), 182, n. 182.

13 [1932] A.C. 562, 580.

14 [1943] A.C. 92; [1942] 2 All E.R. 401, 410.

> In the case of a civil action, [he said], there is no such thing as negligence in the abstract: there must be a neglect of the use of care towards a person towards whom the defendant owes the duty of observing care. And I am content to take the statement of Lord Atkin at p. 580 as indicating the extent of the duty.[15]

Lord Russell of Killowen likewise relied on Lord Atkin's statement for determining whether the defendant was under a duty of care to the plaintiff. In *Donoghue* v. *Stevenson* itself Lord Macmillan used language which, although not so frequently quoted as Lord Atkin's statement, would seem to have the same meaning. He said[16]:

> In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty of care as between those who stand in that relation to each other.

It is respectfully submitted that the imposition of the standard of the reasonable man upon the defendant in all circumstances in which he comes into relations with his fellows is the same as requiring all persons to take reasonable care in the interests of their neighbours.

In *Bourhill* v. *Young*, Lord Atkin's principle was applied negatively to exclude the plaintiff's claim, a procedure followed also in nervous shock in the Australian case of *Chester* v. *Waverley Corporation*[17] by Latham, C.J. But the reports are not lacking in examples of cases in which Lord Atkin's principle has been applied positively to afford the plaintiff a remedy. Among these may be mentioned *Cunard* v. *Antifyre*[18] where under circumstances widely differing from the actual facts in *Donoghue* v. *Stevenson*, Lord Atkin's principle was applied *simpliciter*. Again in *Wilchick* v. *Marks*[19], Lord

[15] [1943] A.C. pp. 116–117.
[16] At p. 619.
[17] (1939), 62 C.L.R. 1, esp. 6, 10.
[18] [1933] 1 K.B. 551 (see especially the judgment of Talbot, J., at pp. 559–61). *Cunard* v. *Antifyre* was doubted in *Shirvell* v. *Hackwood Estates*, [1938] 2 K.B. 577, but was followed in *Taylor* v. *Liverpool Corporation*, [1939] 3 All E.R. 329. See also *Dozgis* v. *Pure Spring Co.*, [1933] 3 D.L.R. 384, and the intriguing case of *Pawlett* v. *University of Alberta*, [1934] 2 W.W.R. 209. (Report not available to the writer, cited F. C. Underhay, article cited *supra* n. 3 at 309, where on Lord Atkin's test the Board of Governors of the University of Alberta were held to be under a duty to take reasonable care to protect freshmen against injury at initiation ceremonies, the plaintiff having been driven insane by his initiation.)
[19] [1934] 2 K.B. 56. Cf. *Hanson* v. *Wearmouth Coal Co.* (1939), 55 T.L.R. 747.

Atkin's notion of liability dependent on 'neighbourly' proximity was utilised by Goddard, J. (as he then was) to grant a wayfarer a remedy against a landlord having a right to enter and repair, in respect of injury suffered through the defective condition of the premises. In *Brown* v. *Cotterill*[20], Lawrence, J., again specifically applying Lord Atkin's test, along with the cognate test of Lord Macmillan already mentioned, gave a remedy to a child injured by a falling tombstone against those who erected the tombstone. 'Everyone' he said, at p. 21, 'is bound to take the care which the ordinary prudent man would take in the circumstances'. Again in *Sharp* v. *Avery*[21], Slesser, L.J., relied on Lord Atkin's principle to grant a remedy to a passenger on a motor-cycle which had crashed owing to the negligence of the defendant in executing an undertaking to the driver of the motor-cycle (on which the plaintiff was riding pillion) that he would lead the cycle safely on its journey.

IV

THE ATKIN TEST OF DUTY OF CARE: AUTHORITIES DEROGATING FROM THE TEST

Yet, despite this accumulation of authority which has treated Lord Atkin's test as a rule of law, and despite the fact that some distinguished writers have treated it as the only test available in our law,[22] the principle is emphatically in conflict with a number of cases decided since *Donoghue* v. *Stevenson*.

One group of these cases proceeds on the view that Lord Atkin's principle was wider than necessary for the decision in *Donoghue* v. *Stevenson*, and that it is therefore merely obiter and not binding. Thus Scrutton, L.J., stated in *Farr* v. *Butters Bros.*[23]

> Apart from the general proposition stated by Lord Atkin, which is wider than necessary, the House of Lords, in my view, has very definitely limited in the case before it the point at which liability exists on the part of the

[20] (1934), 51 T.L.R. 21.
[21] [1938] 4 All E.R. 85, 90.
[22] Notably Professor P. H. Winfield in his article 'Duty in Tortious Negligence' (1934), 34 Col.L.Rev. 41, esp. 58–66. The writer respectfully agrees with him that Lord Atkin's test is tautologous with negligence and serves no useful purpose. A main difference, however, between his view and ours is that in our view Lord Atkin's test is only one version of the duty of care concept; and that the other versions, however objectionable in other respects, are not merely tautologous with negligence.
[23] [1932] 2 K.B. 606.

> manufacturer to a person who ultimately uses the goods which the manufacturer has sold.[24]

So also, in *Herschtal* v. *Stewart & Ardern, Ltd.*,[25] Tucker, J., preferred to grant a remedy to the plaintiff on a narrower statement of the principle in *Donoghue* v. *Stevenson*, and not to rely on Lord Atkin's general words which, he said,[26] had to be interpreted in the light of the facts to which Lord Atkin was referring.

In another group of these cases, decided since 1932, the actual decisions have rested even more directly upon a rejection of Lord Atkin's principle as a universal rule of law. Outstanding among these is *Otto* v. *Bolton* [27] where one of Atkinson, J.'s two main grounds of decision was that the principle in *Donoghue* v. *Stevenson* was limited to chattels.

> That, [he said], was a case dealing with chattels and there is not a word in the case from beginning to end which indicates that the law relating to the building and sale of houses is the same as that relating to the manufacture and sale of chattels.[28]

In short, Lord Atkin's principle was simply ignored. In *Dransfield* v. *British Insulated Cables*,[29] Hawke, J., decided that the accident the subject of litigation was caused by the negligence of those for whom the defendants were responsible. But he refused a remedy because the plaintiff could not bring his case within the *ratio decidendi* of *Donoghue* v. *Stevenson* as that judge understood it.

Hawke, J.'s approach merits further elaboration as an alternative to Lord Atkin's test which goes quite to the opposite extreme. In Hawke, J.'s understanding, the principle in *Donoghue* v. *Stevenson* had to do with the liability of manufacturers of products to users of products and established the existence of a duty of the former to the latter.[30] As such it merely added to the list of types of situations which the law recognises as giving rise to a duty, and, in his view, the plaintiff failed because he could not bring himself within one of these types of situation in which a duty had been historically

[24] P. 614.
[25] [1940] 1 K.B. 155.
[26] At p. 160.
[27] [1936] 2 K.B. 46.
[28] [1936] 2 K.B. 46, at pp. 54–55.
[29] [1937] 4 All E.R. 382.
[30] Cf. on this point *Daniels* v. *White*, [1938] 4 All E.R. 258, *per* Lewis, J., at p. 261.

laid down, and to which *Donoghue* v. *Stevenson* merely added one item.

There is more than a hint of this same approach in the House of Lords decision in *Brackenborough* v. *Spalding Urban District Council*,[31] which is regarded by Dr. Stallybrass[32] as having established an exception to *Donoghue* v. *Stevenson*. In that case Lord Russell of Killowen argued that there was no authority in favour of the plaintiff over the centuries, and that he was not prepared at this late stage to create one. Lord Wright also seems to have based his judgment on the results of his investigation into the question whether historically a duty was owed by market owners to members of the public. Yet, on Lord Atkin's test, if that test were a rule of law, there may well have been little difficulty in holding that the market owners ought reasonably to have had in contemplation that the public might be affeeted by their omission, and therefore owed a duty to members of the public.

Many further examples might be added, but enough ground has been covered to show that Lord Atkin's principle is not always accepted on the authorities as a proposition of law of general application. We may now approach the various alternative tests suggested by the decisions. First, then, is the test to which the group of cases last considered gives some colour, that a duty exists only when the case falls within a historically given and closed list of duty-situations—an extreme of illiberality confronting an extreme of liberality.

V

TEST OF THE CLOSED LIST OF DUTY-SITUATIONS: UNTENABILITY

This other extreme view, in contradistinction to Lord Atkin's, rejects his contention that ' there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances '.[33] On this view the tort remedied by action on the case for negligence is, in effect, not really a single tort at all but a collection of as many torts as there are duty-situations historically laid down by the courts. Whether the plaintiff can succeed, even if all other elements of negligence are present, will depend upon his bringing his case within some particular duty-situation.

[31] [1942] A.C. 310.
[32] *Salmond on Torts*, 10th ed., 1945, 561.
[33] Lord Atkin in *Donoghue* v. *Stevenson*, *cit. supra*, at 579–80.

By 'duty-situation', in this context and throughout this article, the writer means a situation described by reference to the particular characters and relations of the parties involved in it, recognised by the courts as giving rise to a legal duty to take care. Such, for example, are the duty-situations of occupier and invitee, or of manufacturer or repairer of chattels and the user of the chattels, or of persons carrying out activities on the highway and other users of the highway. It is a short method of referring, with some particularity and correctness, to the specific set of concrete circumstances giving rise to the duty of care in the individual case.[33a]

The extreme illiberal view may now be briefly defined as that view which makes the existence of a duty-situation covering the instant case among the closed list of duty-situations a prerequisite for success in an action of negligence.

This view faces even greater difficulties as a proposition of law than does Lord Atkin's view, and may even have to be regarded as discredited. Lord Macmillan stated in *Donoghue* v. *Stevenson* that 'the categories of negligence are never closed', the term 'category of negligence' being used apparently in the context as equivalent to what we have here termed 'duty-situation'. Defendants' counsel in the Court of Appeal in *Haseldine* v. *Daw* advanced the view now under discussion, to the Court, in the form of a submission that 'our law of negligence is nothing but a catalogue of particular duties, the list crystallised forever'. Scott, L.J., gave him but short shrift, and dismissed the submission as inconsistent with the majority opinions in *Donoghue* v. *Stevenson* and with that decision itself.[34] Evatt, J., in *Chester* v. *Waverley Corporation* attacked the same view as exemplified in the judgment under appeal from the Supreme Court of New South Wales. There the plaintiff had suffered shock after coming on to the roadway to look for

[33a] The elements in any particular duty-situation have to be derived from the course of decision. In a case of first impression in which the facts are *a*, *b*, *c*, *d*, *e*, . . . *n*, the court (assuming the subsequent part of the present article to be well founded) may decide that the facts do or do not constitute a duty-situation. If the court decides that they do, then, as far as the actual decision goes, it is left uncertain which of those elements are relevant to the duty-situation. In later cases where only *a*, *b*, *c*, *d* of the above facts are present, the problem will arise directly for decision as to elements *e* to *n*. And so, from the stream of decisions, the elements essential to create the duty-situation may ultimately emerge.

In other words, the problem of precise definition of a duty-situation, once it has been recognised in a leading case, is a particular example of the problem of ascertaining the *ratio decidendi* of a leading case. Cf. J. Stone, *The Province and Function of Law* (1946), 187–190.

[34] [1941] 2 K.B. 343, at pp. 359–363.

her lost child, where she remained until his body was recovered from a trench dug by the defendants on the roadway, in which he had drowned. The Supreme Court had found against her, on the ground that she was not present in the character of a wayfarer startled by a distressing sight. In other words she could only succeed if she could bring her case within the duty-situation already existing in connection with user of the highway.[35]

The difficulties of the extreme illiberal view are, moreover, not limited to these direct judicial attacks. For that view is also clearly inconsistent with the body of authority already examined setting up new duty-situations by the application of Lord Atkin's principle.

Valiant efforts, however, are still made by at least one learned writer to establish the extreme illiberal view. Mr. P. A. Landon has recently asserted it in the form that 'the duty to be careful only exists where the wisdom of our ancestors has decreed that it shall exist'. And he supports this bold if belated faith by stressing the words we have italicised in a passage from Lord Atkin's speech in *East Suffolk Catchment Board* v. *Kent*.[36] The relevant passage was that 'every person . . . is under a common law obligation to *some persons in some circumstances* to conduct himself with reasonable care so as not to injure those persons likely to be injured by his want of care'. The learned writer reads this as a qualification by Lord Atkin on his own principle in *Donoghue* v. *Stevenson*.

But, with respect, it scarcely seems safe to impute to the noble lord so radical a change of outlook on the basis merely of the incidental words in a dictum in a dissenting judgment.[37] And, furthermore, Lord Atkin may have meant by his words 'to some persons in some circumstances', merely to stress that when a duty (in his sense) is owed, it is a duty relative to the persons and to the circumstances and not *in vacuo*.

Even, however, if Lord Atkin did mean to suggest possible limitations on his principle in its application to some kinds of persons or circumstances, this stops far short of Mr. Landon's proposition that the circumstances in which duties are owed (the 'duty-situations') are limited to those laid down by the wisdom of our ancestors. For between the view that Lord

[35] It may be noticed in passing that the English courts, *e.g.*, in *Haynes* v. *Harwood*, [1935] 1 K.B. 146, have not restricted the particular duty-situation in question to include only wayfarers casually on the highway.
[36] [1941] A.C. 74, 89. Mr. Landon's note is in (1941), 57 L.Q.R. 179.
[37] Cf. W. Friedmann, note (1942), 5 Mod.L.Rev. 144.

Atkin's principle is universally true and the view that there is a closed list of duty-situations there lie other possible alternatives. These now fall to be explored.

VI

LORD ATKIN'S TEST AS VALID SUBJECT TO 'EXCEPTIONS' BASED ON AUTHORITIES DECIDED BEFORE DONOGHUE *v.* STEVENSON (1932)

It may be, for instance, that Lord Atkin's principle is in general valid but that it admits of exceptions, namely, the cases where it had been laid down 'historically' *prior* to *Donoghue* v. *Stevenson*, that there is no duty of care in the particular situation, that is, that it is not a *legal* duty-situation. This view would involve the position that the list of exceptions to Lord Atkin's principle was crystallised for all time when *Donoghue* v. *Stevenson* was decided.

Many of the recent cases could be explained on such a modified principle. The group of cases identified above, such as *Cunard* v. *Antifyre*,[38] as applying Lord Atkin's principle simpliciter, could thus be regarded as instances of the main rule; while cases like *Otto* v. *Bolton* [39] (as to which P. H. Winfield has pointed out that as a result of a line of authority through *Cavalier* v. *Pope* 'things had gone too far by 1932 for the House of Lords to put matters right') might be treated as examples of the exception. On such a principle too, the undoubted continued authority of some cases mentioned by Mr. Landon such as *Derry* v. *Peek* can be explained. So too, continued absence of liability of local authorities for non-repair of a highway, and of the owner of animals *mansuetae naturae* for damage resulting from their escape on to the highway, might be explained as decided before *Donoghue* v. *Stevenson* and now sanctioned as exceptions.

The mind, however, recoils from the suggestion that these exceptions should depend on the accidental fact of the existence of authority prior to 1932. Moreover, if, as some writers suggest,[40] the facts of *East Suffolk Catchment Board* v. *Kent* [41] fell within Lord Atkin's general principle, and if, as appears to be the case, the court was not prevented by any authority on all fours with that case from granting a remedy to the

[38] *Supra*, n. 18.
[39] *Supra*, n. 27.
[40] *E.g.*, Mr. Landon, cited *supra*, n. 36.
[41] *Supra*, n. 36.

plaintiff, that case may have to be taken as establishing an exception to Lord Atkin's principle in a situation not judicially passed upon prior to 1932. Further, if, as has also been suggested,[42] the facts of *Brackenborough* v. *Spalding U.D.C.* fell within Lord Atkin's principle, and if, as again appears to be the case, there was no square authority forbidding a remedy to the plaintiff, then this latter case is also an authority allowing the post–1932 establishment of exceptions to Lord Atkin's principle, and militating against the view that only exceptions established by cases decided before *Donoghue* v. *Stevenson* may derogate from the principle.[43]

Perhaps, however, the most patent, and even startling assertion of the power of the courts to create post–1932 exceptions to Lord Atkin's principle in cases which they deem novel is to be found in the recent decision of the High Court of Australia in *Shaw Savill & Albion Co., Ltd.* v. *The Commonwealth.*[44] This was an action against the Commonwealth, under a special statutory provision rendering the Commonwealth liable for the torts of its servants, in respect of the alleged negligence of the master of one of H.M.'s Australian ships in running down the plaintiff's vessel. The defendant pleaded that the accident occurred in the course of actual military operations and the plaintiff demurred. The demurrer was over-ruled by the court on the ground that no duty of care arose in such circumstances. The court did not have before it any authority dealing with civil liability for negligence on the part of the King's forces when in action, but felt bound to exclude the duty of care on grounds of ' reason and policy '.

It is to be carefully observed that the High Court *did not* accept the view that the military operations might be a matter affecting the reasonableness of the conduct even if the duty existed, by which conceivably it might have reconciled its holding with Lord Atkin's principle. Nor would the court accept the escape of leaving the defendant to plead necessity. What it did was to refuse altogether to judge the defendant by the standard of what a reasonable man would contemplate as affected by his acts.

That refusal was nothing other than a refusal to allow Lord Atkin's test for ascertaining the existence of a duty to

[42] *E.g.*, by Dr. Stallybrass, *supra*, n. 32.

[43] The *Spalding Case* might conceivably be regarded, however, as being consistent with Lord Atkin's principle, on the ground that the defendants were entitled to rely on the animals being taken care of by the owners, this negativing the ' neighbour ' relation presupposed by Lord Atkin's principle.

[44] (1940), 66 C.L.R. 344.

be applied to a situation apparently within its terms. And it did this explicitly on grounds of 'reason and policy'. The case is the more striking, in that though some of its circumstances were novel, the analogy was still very close to ordinary cases of negligent navigation where the existence of a duty-situation is unquestionable, whether on Lord Atkin's or any other test.

VII

LORD ATKIN'S TEST AS VALID SUBJECT TO EXCEPTIONS INCLUDING THOSE BASED OR TO BE BASED ON AUTHORITY DECIDED AFTER DONOGHUE *v.* STEVENSON

If, then Lord Atkin's principle allows of some exceptions (and this can scarcely be disputed at this stage), it must also be recognised that the possible exceptions are not on the authorities limited to cases where a duty had been negatived before 1932. The courts may also determine after 1932, and for the future, that no duty arises in a case deemed to be one of first impression even though on the face of it a duty would arise under Lord Atkin's principle.

There are, indeed, hints of such a formulation in the reports. For example, Scott, L.J., in *Haseldine* v. *Daw*[45] said that critics had fallen into the error of assuming that Lord Atkin was intending to formulate a complete criterion. It was only one, although perhaps the most essential test. The same notion seems to be involved in the suggestion that Lord Atkin's principle should be regarded as a 'valuable practical guide',[46] Evatt, J., in *Chester* v. *Waverley Corporation*[47] in examining whether the application of Lord Atkin's principle to the instant case was 'forbidden by law', made perfectly clear by the very nature of his discussion that, by that phrase, he did not mean 'forbidden by cases decided prior to *Donoghue* v. *Stevenson*'.

But the preferability of this kind of view does not depend merely upon the few instances of explicit judicial attention to this aspect of the duty problem. It seems to follow as the only possible view of those considered above, from the elimination of the possible alternatives there seen above to be quite unacceptable. It follows, that is, from rejection, first, of the view that Lord Atkin's principle is universally true, and second,

[45] *Supra*, n. 34 at 362.
[46] W. T. S. Stallybrass in *Salmond on Tort*, 10th ed. (1945), at 434.
[47] *Supra*, n. 17, at 24 *et seq.*

of the view that though it admits of exceptions, those exceptions must be confined within those classes of case where the existence of a duty-situation was judicially recognised prior to *Donoghue* v. *Stevenson*, and third, of the view that there is a closed list of duty-situations. Apart from all else those views conflict gravely with the decided cases; and this fourth view seems the only one thus far examined which is consistent with decided cases.

A court approaching a duty of care case after 1932 will find an important difference according to whether this fourth view is accepted, or one of the other views which we have termed unacceptable. The difference is this. Where such a judge is confronted with a case deemed to be one of first impression, and he finds that the plaintiff is 'neighbour' to the defendant within Lord Atkin's test, he must eventually decide whether the case follows the rule or falls within some exception; and he must do so without the assistance of any general principle from which his decision can be deduced. In short it requires a creative choice by the court; and decision necessarily involves such a choice whether or not the court is conscious of its creative character.

VIII

TEST OF THE OPEN LIST OF DUTY-SITUATIONS

This creative element, necessarily involved in the fourth view, is found even more prominently in the final alternative view now to be examined. This final view we may state in the following propositions. (It is assumed, of course, that the defendant has been negligent as regards the plaintiff, this causing the plaintiff's damage, and that the question is whether a duty of care was owed).

(i) There will be a duty of care where one has been laid down in the past, that is to say, where the type of situation in the instant case is a duty-situation.

(ii) There will not be a duty of care where it has been laid down in the past that there is no duty of care in that particular class of case, that is, where the type of situation before the court is not a duty-situation.

(iii) In all other cases the judge must decide whether there is a duty of care in accordance with his view of what is a proper adjustment of the various interests involved in that type of situation.

This last view is equally maintainable on the authorities

with the preceding one. It is true that Lord Atkin's test is not interposed in the process of decision on this final view. But since, on the view discussed in the preceding head, the court still has to choose between accepting Lord Atkin's test and affirming the duty, and accepting some exception and negativing it, all the cases supporting that view would also support this final view.

Moreover, it might be argued that this final view is preferable on a number of grounds. First, it frankly faces the judicial responsibility for a creative choice; whereas the preceding view conceals it somewhat, not only by emphasising its exceptional character, but also by inviting confusion with the view which limits the exceptions to those established prior to *Donoghue* v. *Stevenson*, no creative function being involved in this latter view.

Secondly, and most important, the former view, taking as its primary inquiry whether the plaintiff and defendant are 'neighbours' in Lord Atkin's sense, continues the tautology between the duty concept and the negligence concept which we have seen to be involved in Lord Atkin's view. In the result, its effect is to merge under the duty head two quite distinct questions—first, what the defendant as a reasonable man was bound to do or omit in the situation in which he found himself, and second, whether the situation was such that the defendant was bound to behave like a reasonable man in the interests of the plaintiff (or, second, in our short phrase, whether it was a duty-situation).

Finally, though historical continuity is itself no conclusive argument, it is not in itself objectionable. And Professor Winfield's study of the history of the duty concept in this connection seems to show that it is precisely thus, by creative decisions on particular situations and relations, by an 'open list of duty-situations', that the courts built up the law as to duties to take care; and that it was not until *Heaven* v. *Pender*[48] that the general test later adopted by Lord Atkin became 'firmly fixed' as a competing doctrine.[49]

[48] 11 Q.B.D. 503 (1883).

[49] See P. H. Winfield, *op. cit. supra*, n. 22, esp. 44–58, the words quoted being at 57. The learned writer traced the situation-to-situation movement in the early decisions on negligence through (i) Duties arising from a public calling, *e.g.*, innkeeper, common carrier, apothecary or surgeon, attorney, farrier, ferryman, barber and carpenter; (ii) Duty arising from a public office; (iii) Duty arising from bailment; (iv) Duty arising from prescription or custom; (v) Duty arising from control of dangerous things. Then, moving into the period when the independent tort of negligence becomes recognised,

IX

DANGERS ARISING FROM MUTUALLY TAUTOLOGOUS DEFINITIONS OF 'NEGLIGENCE' AND 'DUTY OF CARE'

It is submitted that in terms of the distinction here drawn one of the conflicts of judicial opinion which emerge from *Woods* v. *Duncan*[50] can be explained. Viscount Simon, in determining whether there was a duty of care owed by the defendants Cammell Laird to the plaintiffs, limited himself to the consideration whether the defendant was in one of the established duty-situations as regards the plaintiff. Having decided that 'Cammell Laird owed a duty to them, analogous to the duty owed by an occupier to invitees',[51] he considered that the duty requirement had been satisfied. Similarly Lord Porter considered that the duty requirement had been satisfied.[52] But Lord Russell of Killowen, following Lord Atkin's approach, tested for the existence of a duty-situation by inquiring whether the defendant's conduct was reasonable in the interest of the plaintiff.[53] By that test he found in effect that the relevant duty had not been made out. On the view now being advocated, which avoids the tautology between the duty and negligence concepts, the procedure of Viscount Simon and Lord Porter is to be preferred to that of Lord Russell of Killowen. Nor is the point merely academic. For though in the particular case all the Lords reached the same result the diverse mode of analysis is bound to yield its harvest of debate and confusion in later situations.

The dangers arising from the tautology between the duty of care and negligence concepts extend even to the serious unsettling of the respective functions of judge and jury. On this matter Dr. Stallybrass[54] has offered the following stimulating observation.

> It is not always easy to distinguish the determination of the existence of the duty (which is for the judge) from the determination of the violation of the duty[55] (which is

new problems arise with the relation of contractual duties to 'negligence' duties, springing from the historical origin of contracts in *assumpsit*.

Until *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, as the learned writer points out, the duty notion of the Atkin type was barely even formulated. The duty element, though it is not explicitly discussed is implicitly attached to concrete situations and relations as illustrated above. In new situations absence of authority did not deter the courts from extending liability; but on the other hand they did not feel compelled to extend.

[50] *Cit. supra.*
[51] *Ibid.* at 286.
[52] *Ibid.* at 291.
[53] *Ibid.* at 288.
[54] In *Salmond on Tort*, 10th ed. (1945), 432, note (r).
[55] Dr. Stallybrass here uses 'violation of the duty' in the sense in which we have used the word 'negligence' as one of the elements in the tort of

for the jury). So in *Camkin* v. *Bishop*,[56] a schoolboy of fourteen was injured by a lump of earth thrown by another schoolboy whilst they were 'ragging' when helping a local farmer. The headmaster was sued. It was held that the defendant was under no duty to see that the boys whilst engaged upon such work were under supervision. It might equally well have been held that the defendant was under a duty to take reasonable precautions for the safety of his pupils, but that there was no evidence to submit to a jury of a failure to perform that duty. Cf. *Ricketts* v. *Erith B.C.* (1943), 169 L.T. 396, where in the case of a child injured in a playground, Tucker, J., held that the duty of the school authority was that of a 'reasonably careful' parent.

On the present writer's analysis the distinction between *Camkin* v. *Bishop* and *Ricketts* v. *Erith Borough Council* seems to be as follows. In the former case the court was not content to deal under the 'duty' head merely with the problem of establishing a duty-situation. (This would have been satisfied, assuming *Ricketts' Case* to be rightly decided,[56a] by establishing the relationship of master and pupil between the defendant and the plaintiff, and that the accident occurred at a time when the relation was operative to vest control in the master.) Instead the court in *Camkin* v. *Bishop* appears to have gone on to deal with additional circumstances which were

negligence. It is respectfully submitted that the terminology used in the present article, though unsatisfactory in that it involves the use of the word negligence in two senses, *viz.*, as the name of a tort and also as the name of an element in the tort, is preferable to the alternative adopted by Dr. Stallybrass. For terms such as 'violation of duty', and 'breach of duty' may seem to imply that under that head the only and the simple inquiry is whether the defendant's conduct was in breach of a duty precisely and concretely laid down under the duty head. For this reason it tends to cause the distinction between the duty and negligence problems to be overlooked. For whether negligence is resolvable into mere breach of the duty owed, depends upon those very questions as to the nature of the concept of duty of care with which the present article is concerned.

[56] (1941), 165 L.T. 246. So cf. the extraordinary case of *Pawlett* v. *University of Alberta* cited *supra*, n. 18, where the Board of Governors of the University of Alberta were held liable to a student who had been driven insane in the course of the initiation ceremonies conducted by his fellow students.

[56a] As to the difficulties of defining an intelligible duty-situation in some circumstances, see *Searle* v. *Wallbank* (1946), 63 T.L.R. 24 at 26.

It is assumed in the above reasoning that *Ricketts' Case* did correctly lay down the relevant duty-situation, as it emerged from the course of decision prior to that case.

In the present view, where the case is one of first impression, the court has a discretion not merely as to whether it will establish a new duty-situation but also as to how narrowly or broadly it will define that situation, and consequently how much is to be dealt with by the judge and how much by the jury.

If a duty-situation is found in such a case of first impression, its scope cannot be determined *a priori*, whichever of the tests of duty of care which we have termed acceptable is being used. See on the whole matter n. 33a above.

relevant to the question whether the defendant had acted reasonably in the duty-situation, as if that question were also part of the duty problem. Having decided that absence of supervision was reasonable, that court decided there was no duty.

Now such a procedure stems readily from a definition of duty such as Lord Atkin's, which is tautologous with the definition of negligence. And it is to be observed that, carried to its logical conclusion, it would eliminate the jury's function altogether. On the other hand, if the duty concept is kept distinct from the negligence concept, it would have to be observed, with respect, that the court in *Camkin* v. *Bishop* ought not to have proceeded as it did, but should have adopted the procedure which Dr. Stallybrass argues that it might 'equally well' have adopted. That is, it ought to have affirmed the duty but found that there was no negligence. In proceeding as it actually did in *Camkin* v. *Bishop* the court was able, by carrying analysis of the duty beyond the point at which the legal standard of reasonableness is laid down, to decide questions which (apart from a finding of 'no evidence') should be left to the jury.

X

COMPETING VERSIONS OF THE TEST AS A LEEWAY FOR CREATIVE JUDICIAL CHOICE

As we have seen, the view that Lord Atkin's principle holds subject to exceptions, judicially established before or after 1932, or in the future, is equally tenable on the authorities with the last of the views we have considered, namely that there is a list of 'duty-situations', established by authority, within one of which the plaintiff must bring his case, or else persuade the court to add a new duty-situation to the list. Either view is tenable on the authorities: and for reasons already given the writer prefers the latter. But the important point is that *only* these two views are tenable on the authorities, and that both of them involve a creative choice by the judge.

For both these tests Leon Green's observation remains profoundly appropriate.[57]

> How does the stating of the problem in terms of duties enable a judge to pass judgment? Where shall he find

[57] See L. Green, 'The Duty Problem in Negligence' (1928), 28 Col.L.Rev. 1014, the quotation being from 28 Col.L.Rev. at 1024. Cf. J. Stone, *The Province and Function of Law* (1946).

> the source of duties? Do judges find them ready made? Do they assume them? Do they create them, and if so do they create them in wholesale, or must each court create a particular duty which fits the particular case before it? So far as I have been able to discover, the common law courts have stumbled through the whole period of their existence without committing themselves on the inquiry. Perhaps it is a subject which is not to be talked about. We are clearly dealing with the very process by which law is generated

Professor Green's articles were a valiant and stimulating inquiry into the factors which should guide this vital phase of the judicial process in negligence cases. They were in effect a study in the application of theories of justice to negligence cases.[58] Much work remains to be done in that inquiry especially after *Donoghue* v. *Stevenson*. The present interest however, lies in another question, arising from the necessity of creativeness in this field. It was hinted at in Professor Green's sentence: 'Perhaps it is a subject which is not to be talked about'. *Our* questions are—Why is it therefore that the courts appear to proceed in these cases as if they were merely applying existing rules of law? And how is this possible without explicit judicial recognition that decision is, in Lord Wright's phrase, 'an act of will'?

We may be permitted to offer a hypothesis based on the foregoing analysis. In this hypothesis the ambiguity of the requirement that there must be a duty of care in the particular type of situation plays a central role. Let it be supposed in the following discussion that the court is confronted with what it deems to be a novel set of circumstances and the question is to be decided whether the defendant owed a duty. Let it then be supposed that in such a case the court would be inclined on considerations of justice and policy alone, to grant a remedy to the plaintiff if the law permits. Now if the court in such a

[58] Professor Green was writing before *Donoghue* v. *Stevenson*, but he deals with what was later to become Lord Atkin's test under the name 'the danger test', at pp. 1028 ff., in discussing Brett, M.R.'s cognate formula in *Heaven* v. *Pender*, 11 Q.B.D. 503 (1883), and Cardozo, J.'s acceptance of it in *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382; 111 N.E. 1050 (1916). He finds that test defective as concentrating unduly on the danger factor, whereas (he points out) our law often prefers to sanction the creation of dangers if other compensating factors are present. He believes that the test for creation of these duties cannot be constrained even within so wide a formula, but involves in each type of situation the weighing *inter alia* of factors including: 1. The administrative factor. 2. The ethical or moral factor. 3. The economic factor. 4. The prophylactic factor. 5. The justice factor. These factors are explained *ibid.* 1035–1045, and in the whole article in 29 Col.L.Rev. 250 *cit. supra*, n. 3.

case were to accept Lord Atkin's principle as universally true, it would find that it could apparently reach the solution to which it is inclined by mere logical deduction from that principle. Such are many of the decisions cited under Head III above as positively applying Lord Atkin's principle as if it were subject to no exceptions. Let it be supposed, on the other hand, that the court would be inclined, on considerations of justice and policy alone to refuse a remedy 'if the law permits'. Now, if the court, being so inclined, were to accept the view that the requirement of duty of care means that the plaintiff must bring his facts within one of a list of existing duty-situations, historically established by earlier decisions, (Lord Atkin's principle either being ignored, or dismissed as *obiter*) then it would find that it would reach the solution to which it is inclined by mere logical deduction from that conception of the duty requirement.

On this hypothesis, we would have here an example of what Professor Stone has called 'the single legal category with competing versions of reference'.[59] What Professor Winfield has termed the two-fold nature of *Donoghue* v. *Stevenson*, would be enabling later judges to derive from it at will a decision either way in the instant case according as they chose as its *ratio decidendi* Lord Atkin's principle, or some narrower principle, *e.g.*, one limited to chattels, thus treating *Donoghue* v. *Stevenson* merely as adding a particular duty-situation to the existing list. In a novel type of case (meaning here as elsewhere in this article, a case deemed by the court to be one of the first impression),[60] indeed, where judicial creativeness must operate, Lord Atkin's test and the test of the closed list of duty-situations must inevitably (assuming negligence is established) yield opposite results.

Thus far we have spoken in hypothetical terms. But it is submitted, with respect, that this account may represent the objective meaning of the divergent lines of authority from *Donoghue* v. *Stevenson* considered under Heads III and IV above. Sometimes, indeed, the free selection between the two competing versions is almost explicit. In *Old Gate Estates* v. *Toplis*[61] the plaintiff had relied, to his loss, on a valuation by the defendant (a valuer) in circumstances in which the defendant should have foreseen the likelihood of such reliance.

[59] J. Stone: *Province and Function of Law* (1946), 179 ff.
[60] For the difficulties of judgment in determining whether facts are novel, see *ibid.*, 187–190.
[61] [1939] 3 All E.R. 209.

There was no contractual relation between the parties. On suit against the defendant for negligence in making the valuation, Wrottesley, J., treated the case as one of the first impression.[62] The learned judge approached his problem on the basis that the decision was to be arrived at by the application of *Donoghue* v. *Stevenson* to a novel type of situation.

He began[63] by citing Lord Atkin's principle as set out on p. 580 of the report of *Donoghue* v. *Stevenson*. He then proceeded:

> That, I think, is the passage upon which, not unnaturally, the plaintiffs rely in this case. However, it is always dangerous to take a passage out of its context, and to see whether any given set of facts can be brought inside that statement, and, if so, to say to oneself: 'Here is a cause of action'. That observation is, I think, applicable to the endeavour in this case to frame a cause of action upon that particular passage in the opinion of Lord Atkin. As a matter of fact, what was decided in *M'Alister* (or *Donoghue*) v. *Stevenson* is, I think, quite clearly and succinctly set out in the headnote:
>
> > 'By Scots and English law alike, the manufacturer of an article of food, medicine, or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health'.[64]

Wrottesley, J., did not carry his preference for the headnote *ratio decidendi* to its full extreme. And, indeed, it would have been excessively difficult to show that the negligent fitting

[62] Perhaps unnecessarily since the case might possibly have been disposed of on the principle of *Derry* v. *Peek* to the effect that negligent misrepresentations do not give rise to an action in tort. Cf. W. T. S. Stallybrass in *Salmond on Tort*, 10th ed. (1945), 570. *Derry* v. *Peek* was not mentioned in the case.

[63] At p. 215.

[64] Glanville Williams, 'Negligent Contractors and Third Parties' (1942), 92 L.J.Newsp. 115, 124, 132, admirably illustrates the difficulty of restraining the rule in *Donoghue* v. *Stevenson* within some narrow *ratio decidendi* which would reduce it to a mere additional item in the list of duty-situations. These articles are a gloss point by point on the narrower *ratio* contained, *e.g.*, in Lord Atkin's speech at 599 (as opposed to his wider test on 580). Dr. Williams' survey shows that later cases have gone outside the range of the narrow *ratio*, often without definable limits, on the following major points: (1) as to whether only manufacturers are caught; (2) as to whether only 'products' are caught; (3) as to whether the plaintiff must be a 'consumer'; (4) as to how far the products must come in unchanged form to the consumer's hands; (5) as to the absence of intervening inspection; (6) as to whether the negligence must be in the 'preparation' and setting up; (7) as to whether damage must be to life or property only.

of a sidecar to a motor cycle, or the careless replacement of a wheel on a motor lorry (held to be within the *Donoghue* v. *Stevenson* principle in *Malfroot* v. *Noxal*[65] and *Stennet* v. *Hancock*[66]) came within the term 'manufacture . . . of food, medicine, or the like'. The learned judge therefore somewhat extended the headnote *ratio* to cover things dangerous to life or limb negligently created or put into circulation by the defendant.

Even in this more liberal form, however, he was still setting up the closed list of duty-situations test, as against Lord Atkin's test. When he chose the former he decided the case for the defendant by the application of his chosen version of the legal principle involved. Had he chosen Lord Atkin's test he would also thereby have decided the case, but this time for the plaintiff, by the application of his chosen version of the legal principle involved.[67] But no compulsions of law dictated his choice of one version or the other, despite the fact that which version he chose decided the case. In substance the appearance of derivation of the decision from the version of the legal principle may conceal the fact that in the last resort it was the learned judge and not any principle of law which dictated the judgment for the defendant.

We are not here concerned to consider the desirability of the version adopted in the *Old Gate Estates Case*, though it has been subjected to notable criticism.[68] What we are concerned to show is only how the existence of competing versions simultaneously compels creative choice by the court, and yet conceals, by appearance of derivation from the version chosen, the fact that the court was in no way compelled to derive its decision from that version, as opposed to another which would have yielded the opposite decision.

This observation is only reinforced by the availability of still other versions. In a recent New South Wales case it was suggested that 'as a general rule the legal duty to take care to avoid causing injury to others which exists at common law is restricted to physical injury either to person or to property'.[69] And this view of the law of Jordan, C.J., was adopted by Macrossan, J., in the Queensland case of *Sinclair*

[65] (1935), 51 T.L.R. 551.
[66] [1939] 2 All E.R. 578.
[67] As a South African court in fact did on very similar facts in *Perlman* v. *Zoutendyk*, S.A.L.R. (1934) Cap.Prov.Div. 151, not available to the writer in the report, but cited in F. C. Underhay's article cited *supra*, n. 3.
[68] See *e.g.*, W. T. S. Stallybrass in *Salmond on Tort*, 10th ed. (1945), 582.
[69] *Levi* v. *Colgate-Palmolive*, 41 S.R. (N.S.W.) 48, *per* Jordan, C.J., at p. 50.

v. *Cleary*,[70] where a racehorse owner had sued the judge of a race for negligently failing to place the plaintiff's horse first. It was held that Lord Atkin's principle was not applicable to cases where the loss likely to accrue from the failure to take care was economic loss to the pocket of the plaintiff but not physical injury to his person or property, and that therefore there was no duty to take care in the case before the court. Such views can be related to the suggestion of Wrottesley, J., that Lord Atkin's test is limited to cases of danger of injury to life and limb; they afford a somewhat wider version of that test extending the duty of care to cover physical injury to property as well as life and limb. They propose, on one interpretation at least, to limit it not by reference to specific exceptions for particular types of relationship, or by positing a closed list of duty-situations, but by subjecting it to a general limitation turning on the kind of damage to the plaintiff which ought to have been in the reasonable contemplation of the defendant. This is, of course, a logically possible version of the *ratio* of *Donoghue* v. *Stevenson*, as Professor Stone has suggested[71] and it was an effective legal starting point for refusing a remedy to the plaintiff in some novel type of case such as the Queensland case under discussion.

But it seems to the present writer less satisfactory than the more courageous methods of establishing exceptions to Lord Atkin's principle by refusing to add to the established list, or of rejecting Lord Atkin's principle altogether, and insisting that the plaintiff bring his case within the list of duty-situations as it exists, or as it ought now to be extended. There may well be strong grounds of policy (for instance to avoid a flood of actions by losing punters) for refusing a racehorse owner a remedy against the judge, yet it seems undesirable to place a sweeping and rather strained and arbitrary limitation upon Lord Atkin's principle merely in order to produce an exception for this rather special set of relations. For such a general limitation if followed in later cases in which interests of a different character are at stake, might dictate quite arbitrary and undesirable results. Suppose, for instance, that X, a manufacturer of underwear, has negligently permitted sulphites to remain in goods which he sells to distributor Y. Y in turn sells them to retailer Z, who sells them to the ultimate purchaser; and the purchaser recovers against Z for breach of contract. According to Jordan, C.J.'s

[70] [1946] S.R. (Queensland) 74. Cf. *De Yong* v. *Shenburn* (1946), 62 T.L.R. 193.
[71] See J. Stone, *op. cit. supra*, n. 11 at 188.

interpretation of Lord Atkin's principle, Z would have no remedy against X in tort, for there is no physical damage to Z's property or person, nor could any have been reasonably contemplated by X. A manufacturer is not to expect a retailer to wear the goods he purchases for his business.[72]

SUMMARY AND CONCLUSIONS

The results of the present inquiry concerning the duty problems in the tort of negligence as it stands after *Woods* v. *Duncan* may therefore be summarised thus:—

1. The continuing mysteries of the tort of negligence are strikingly seen in the fact that three members of the House of Lords in *Woods* v. *Duncan* who agreed that the defendant could not as a reasonable man have contemplated that his negligence might cause the plaintiff's loss, each took a different legal ground for defeating him. One held that there was a duty of care towards the plaintiff and negligence, but that this negligence did not cause the loss. Another held that there was a duty of care, and that the defendant's conduct was indeed the cause of the loss, but that the defendant was not negligent. And the third held that though there might have been negligence, and though that negligence in law might have caused the loss, still the plaintiff was not liable since the defendant owed him no duty of care.

2. The inner mystery of the tort of negligence seems to lie in the concept of the duty of care. Two broad and largely opposed tests are concealed beneath that notion:

> (1) Lord Atkin's test depending on whether the defendant ought to have had the plaintiff in contemplation as affected by his act. This gives a range of liability which is extremely wide—indeed as wide as the concept of negligence itself—for it is tautologous with that concept. There is much judicial language and authority apparently supporting this test *simpliciter*; though there is also much, referred to in the next two paragraphs, inconsistent with it, and preventing it being regarded *simpliciter* as a valid proposition of law.

[72] The writer therefore agrees with Dr. Glanville Williams' criticism (article cited *supra*, n. 3 at 133) of the attempt to exclude economic loss as such from the principle of *Donoghue* v. *Stevenson*, merely because Lord Atkin at one point in his speech on p. 599 spoke of 'injury to the consumer's life or property'.

We are not here concerned with the correctness of Jordan, C.J.'s version, nor with the likelihood of it being adopted. The strongest doubt cannot be concealed, however, as to whether the Privy Council would subject *Grant* v. *Australian Knitting Mills*, [1936] A. C. 85 to any such limitation.

(2) At the other extreme is the test for the existence of a duty of care which we have called ' the test of the closed list of duty situations '. This on a variety of grounds rejects or ignores Lord Atkin's test. It would impose on a plaintiff the task of showing that the situation in which the defendant acted was one in which in the past the courts had raised a duty of care. This extreme view seems certainly untenable in view of cases like *Donoghue* v. *Stevenson* itself, and the many cases extending the ambit of *Donoghue* v. *Stevenson* on the basis of Lord Atkin's test.

3. The search for a rule which will reconcile the decisions lies somewhere between these two extremes. One possible rule explaining the authorities is that Lord Atkin's test holds subject to exceptions. Despite some suggestions to the contrary, these exceptions would have to include not only situations where a duty had been negatived prior to 1932, but also those in which the courts have negatived a duty since then, or may negative it in the future. In any application of this modified test the court is inevitably faced, in a novel situation, with the necessity of making a creative choice in deciding whether to hold for the plaintiff under Lord Atkin's test, or for the defendant under some exception.

4. The holdings, as distinct from dicta, could also be explained on another test, which we have here termed ' the open list of duty situations '. On this view there is (as it were) a list of duty-situations, that is of situations already judicially held to raise the duty. In any later situation corresponding to one appearing on the list the later court must find there is a duty. There is also (as it were) another list of situations already judicially held not to raise a duty, and there, too, the later court must follow in corresponding situations. But in any novel situation, that is such as does not substantially correspond to any already judicially pronounced upon, the list is still open for a determination either way. On this view too, therefore, the courts must necessarily make a creative decision, whether to raise or not to raise a duty. And their decision here, as well as under the last-mentioned test, is creative not only as regards the case at bar (since deciding it according to a rule created by that very decision), but also because the rule thus created will add a new item either to the list of duty-situations, or to the list of non-duty situations.

5. The tests stated in paragraphs 3 and 4 are the only ones tenable on the authorities; and both of them necessarily involve

choice by the judge free of legal compulsion—what Lord Wright terms an act of will. As between them the latter may be preferable, as conducing to fuller recognition by the court of the creative responsibility which it cannot in any case avoid; as avoiding terminological confusion with some of the tests which are unacceptable on the authorities, and as avoiding the difficulties arising from the tautology of Lord Atkin's test with part of the test of negligence.

6. Despite the unacceptability on the authorities of the closed list of duty situations and of Lord Atkin's test *simpliciter*, both are intricately embedded in the literature. They are available along with the more acceptable tests as competing versions of the legal test for the existence of a duty of care in the tort of negligence. The two extreme versions will, assuming there is negligence, inevitably yield opposite conclusions in a case with novel features. This is a main clue to the manner in which the courts are able to cover the creative activity necessarily involved in such a case with an appearance of merely applying to the present situation an existing rule as to the duty of care. The objective reality is that the choice of one version decides the case one way; the choice of the other the opposite way. And the law itself does not compel the court to choose one version rather than another. Judicial freedom, too, is extended rather than otherwise by the existence of various subordinate versions within each version.

W. L. MORISON.

FRUSTRATION OF CONTRACT IN COMPARATIVE LAW AND IN THE NEW GREEK CIVIL CODE OF 1946 (Article 388)

By Pan. J. Zepos, ll.d.(athens)
(Professor of Civil Law at the University of Thessalonike)

I

The principle *pacta sunt servanda* has an axiomatic significance in any system of the law of contracts. This principle, however, underwent a fundamental change, especially in recent times, under the influence of the so-called doctrine of frustration of contract, according to which a supervening change in the circumstances under which a contract was concluded may lead to the discharge of the contract and to the release of the parties from any obligation to fulfil their promises. Thus, the doctrine of frustration appears as a serious limitation of the axiomatic value of the principle *pacta sunt servanda*. Its theoretical foundation, however, still remains a problem with different aspects in the legal systems of the various countries, in the English legal system as well as in the systems of the continental countries. It is worthy of notice that an attempt was recently made by the framers of the new Greek Civil Code of 1946 (art. 388) to formulate a provision relating to this crucial problem of frustration of contract, an attempt which gave a legislative expression to the theory of continental lawyers and to the experience acquired during the last decades in continental court practice.

The problem of frustration had met a different fate in English law from the one it had in the legal systems of continental Europe.[1]

In English law the problem of the 'foundation of the contract' or of the 'basis of the contract' arose for the first time in the so-called Coronation cases, in which, however, the problem was not solved in accordance with a general principle,

[1] See, for a brief comparative survey, H. Titze in *Rechtsvergleichendes Handwörterbuch*, Vol. 6, pp. 317 *et seq.* Also E. Rabel, *Das Recht des Warenkaufs*, I, 1936, pp. 353 *et seq.*, and recently H. C. Gutteridge, *Comparative Law*, 1946, pp. 66 *et seq.* See now also the contributions published in *The Journal of Comparative Legislation*, Vol. 28 (1946), parts iii–iv, pp. 1 *et seq.*

but a special solution was given in each concrete case. Later on, after the 1914–1918 World War, the practice of the English law courts adopted the principle of the release of the debtor from his obligation for ' very special facts ' in case of supervening change of circumstances. This was done on the basis of various theories, the principal of which were: the theory of ' implied term ', the theory of disappearance of the foundation of the contract, the theory of failure of consideration, the theory of common mistake, the theory of quasi-contract, etc. The theory of the ' implied term ' seems to be the leading theory in English and American case law and court practice as well as under the rules contained in the law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6, c. 40).[2] And a similar solution has been accepted by the Scandinavian legal systems, which in paragraph 24 of the Sale of Goods Act provides that the debtor may be released from his obligation in case of impossibility of execution of the contract owing to a fact which could not have been foreseen by the parties when the contract was concluded.

In the legal systems of France, Italy and the other countries of the so-called family of Latin legal systems, the problem of frustration of the contract has been connected with the problem of the existence of a fault on the part of the promisor. Only in the case of a ' cause étrangère qui ne peut lui être imputée ' (art. 1147 of the French Civil Code) or of ' force majeure ' or ' cas fortuit ' (art. 1148, French Civil Code), is the promisor released from his obligation. In all other cases of fault of the promisor the principle *pacta sunt servanda* is obligatory and the contract cannot be discharged. Simple difficulties of performance, even when based on unforeseen facts, *e.g.*, war, strike, etc., cannot lead to a release of the promisor's obligation. This is in accordance with the general application of the principle of fault which is decisive under the legal system of France and of the other countries of the Latin family. This conception, however, is misleading. Frustration of the contract in cases of supervening change of circumstances has its special meaning irrespective of the fault of either party to a contract. The defects of this French and Latin conception are obvious today even in France, Italy and other Latin countries where the

[2] See Sir Arnold D. McNair, *Legal Effects of War*, 2nd ed. (1944), pp. 133 *et seq.*, 143 *et seq.*; P. H. Winfield in *Pollock's Principles of Contract*, 12th ed. (1946), pp. 225 *et seq.*, and literature and case-law mentioned therein; G. C. Cheshire and C. H. S. Fifoot, *The Law of Contracts*, 1945, pp. 366 *et seq.* For American Law see Williston, *Contracts*, §§ 1931 *et seq.*, and *Restatement of Contracts*, §§ 454 *et seq.*

adherents to a so-called ' *théorie de l'imprévision* '—accepted by the Conseil d'Etat but never by the Cour de Cassation !—support the recognition of the power of the court to reduce the promisor's obligation in cases of change in the circumstances under which the contract was made.[3]

The legal systems of the Central European countries arrived at the acceptance of the principle of frustration of contract in a different way. The problem of frustration of the so-called ' reciprocal ' contracts (gegenseitige Verträge)—in which obligations are created on both sides—became acute, especially in Germany after the World War of 1914–1918, during the period of inflation and devaluation of the currency, when the principle *pacta sunt servanda* proved inadequate to meet the requirements of transactions. Thus, for the first time, the principle *pacta sunt servanda* suffered a decisive rupture : the so-called *clausula rebus sic standibus*, the theory of ' presupposition ' (Voraussetzungstheorie) of B. Windscheid, the theory of ' the basis of the contract ' (Geschäftsgrundlage) of P. Oertmann, lastly the wide application by the German ' Reichsgericht ' of the rules contained in § 157 and § 242 of the German Civil Code and relating to good faith (Treu und Glauben) attempted successively to give a theoretical basis to the problem of frustration. Other theories adopted an ' implied condition ' as the theoretical foundation of the frustration of the contract (see Leonhard, *Allgemeines Schuldrecht des B.G.B.*, 1929, pp. 415 *et seq.*) or spoke of a ' limit of sacrifice ' which can be claimed from the promisor under the principles of good faith (Heck, *Schuldrecht*, 1931, § 28 (8) and § 32). The prevailing opinion, however, adopted the solution applied by the ' Reichsgericht ', which recognised the principle of good faith laid down in § 242 of the German Civil Code as decisive for the solution of the whole problem. Thus, generally speaking, although unanimity is not to be found in theory and practice of the Central European countries, the problem of frustration of contract has, in these countries, led towards the broadening of the conception of non-performance of the contract. Indeed, not only does supervening casual impossibility of performance release the

[3] See Planiol-Ripert-Esmein, *Traité pratique de droit civil français*, VI, *Obligations*, Nos. 391 *et seq.*; Demogue, *Traité des Obligations en général*, VI, No. 640, and the practice of the Conseil d'Etat and the Cour de Cassation mentioned therein. See also the so-called Loi Faillot of January 21, 1918. For the position of the problem in Italy see M. Andreoli, ' Revisione delle dottrine sulla sopravenienza contrattuale ', in *Rivista di diritto civile*, Vol. 30 (1938), pp. 309 *et seq.* See now, in general, R. David in *The Journal of Comparative Legislation*, Vol. 28 (1946), parts iii–iv, pp. 11 *et seq.*

promisor from his obligation, but the 'excessive difficulty' (übermässige Schwierigkeit, Unerschwinglichkeit der Leistung) releases him also, when the overcoming of such a difficulty cannot be demanded from the promisor reasonably or under the principles of good faith and of fairness in transactions. The result was that the conception of 'Unzumutbarkeit der Leistung' became a new element in the theory of non-performance, and this element was formulated vaguely at first in article 269 of the Law of Obligations of Poland and in § 1150 of the Second Hungarian Draft, but especially and more clearly in the Memorandum relating to the Law of Contracts drawn up by the Nazi Academy of German Law in 1936, in the Agreement of the German-Italian Committee for the legal relations between these two countries (Vienna, 1939), and lastly in articles 306 *et seq.* of the Italian Civil Code of 1941.[4]

The gist and essence of all these provisions is that in cases of an unforeseen change of the circumstances under which a contract was made and in cases of excessive difficulty in the fulfilment of an obligation, a right of rescission is recognised. At the request of the interested party, the court may either discharge the contract or reduce the obligation of the promisor to a reasonable extent. In general, it may impose alterations and modifications upon the obligations arising from the contract—a principle which presupposes the recognition of a broad mission of the judge, who, according to these provisions, is able to modify and even discharge a contract, although the ancient maxim, *pacta sunt servanda*, continues to retain its significance and to apply as a general rule.

The acceptance of such a principle is a common requirement in Anglo-American and Continental legal systems of today. Its theoretical foundation, however, is not yet unanimous under the legal systems, theory and court practice of the various countries. Consequently the Committee of the Rome Institute for the Unification of Private Law, which in 1935

[4] For the conception of 'Unzumutbarkeit der Leistung' see H. C. Nipperdey, *Vertragstreue und Nichtzumutbarkeit der Leistung*, 1921; for the Memorandum of the Nazi Academy, H. Stoll, *Die Lehre von den Leistungsstörungen*, 1936, pp. 67 *et seq.*, 78 *et seq.*, §§ 11, 21, 24, etc.; and for the Agreement of the German-Italian Committee, J. W. Hedemann, 'Der Vertrag und die veränderten Umstände', in *Zeitschrift für ausländisches und Internationales Privatrecht*, Vol. 12 (1939), pp. 714 *et seq.* Also, in general, G. Simonetos, *Das Recht der Leistungsstörungen nach dem Entwurf eines griechischen Zivilgesetzbuches und nach dem Entwurf der Akademie für Deutsches Recht*, 1938, and a contribution by the same author in *Archeion Idiotikou Dikaiou*, Vol. 7 (1940), pp. 333 *et seq.*, where further references to literature and case law are made. See also E. J. Cohn in *The Journal of Comparative Legislation*, Vol. 28 (1946), parts iii, iv, pp. 15 *et seq.*

prepared a draft of an international law of sale for the League of Nations, was not able to propose any provision for an absolutely general solution of the problem of frustration.[5] Thus, the formulation of a provision relating to the frustration of contract remained a national legislative problem for every country. And the framers of the new Greek Civil Code of 1940, now in force since 1946,[6] tried to give a solution to this crucial problem by a provision contained in article 388 of the new Code.

II

The rules contained in article 388 of the new Code have their own history, an interesting history under the system of the Roman law which was in force in Greece until the recent advent of the new Code.

Indeed, the whole problem of non-performance of a contract was governed in Greece, before the advent of the new Civil Code, by the provisions of the system of Roman law as developed in the teaching of the Pandectists during the nineteenth century. According to the teaching of the Pandectists, the principle of Culpa became the element which decided whether the promisor was responsible or not for damages in any case of non-performance of the contract. And this same principle of Culpa was also decisive in any case of impossibility of performance, provided the obstacle which hindered the fulfilment of the obligation was serious and not a simple difficulty which the promisor had to overcome.[7]

The problem, however, of frustration of contract owing to excessive difficulties on the part of the promisor soon appeared before the Greek tribunals, first after the unfortunate war against the Turks in 1897, and then more acutely owing to the devaluation of currency following the World War of 1914–1918. The most distinguished Greek writers then tried to increase the number of cases of release of the promisor from his obligation, through a broadening of the conception of impossibility,

[5] See *Projet d'une loi internationale sur la vente*, Rome (1935), pp. 32 *et seq.*; *Rapport sur l'activitè de l'Institut International de Rome pour l'Unification du Droit Privé*, 1938–9, p. 10; H. C. Gutteridge, *Comparative Law*, 1946, p. 67.

[6] On the history of the new Greek Civil Code of 1946 see P. Zepos in *The Journal of Comparative Legislation*, Vol. 28 (1946), parts iii, iv, pp. 56 *et seq.*

[7] See V. Arangio-Ruiz, *Responsabilità contrattuale in Diritto Romano*, 2nd ed. (1933); Jörs-Kunkel-Wenger, *Römisches Privatrecht*, 1935, §§ 108 *et seq.*; R. Jhering, *Das Schuldmoment im Römischen Privatrecht*, 1867; Windscheid-Kipp, *Lehrbuch des Pandektenrechts*, 9th ed. (1906), II, § 264, and all the modern Greek literature mentioned at length by A. Gazis, *The non-performance of the contract* (in Greek), 1940, pp. 4 *et seq.*

in order to cover also cases of unforeseen excessive difficulty of performance. The doctrine of the principle of good faith and the wide application it had been given in the Central European countries and especially in Germany were further introduced and supported by Greek legal literature. And finally some special laws were enacted which recognised the principle of frustration of a contract in cases of an unforeseen and supervening change of the circumstances under which the contract was made, especially when the contract was made between private individuals and the Greek State as Fiscus.[8]

Notwithstanding, however, the opinion of Greek authors and the recognition of the principle of frustration or reduction of the promisor's obligation in special enacted laws, the Greek tribunals did not adopt this principle as a general rule in cases of non-performance of a contract. In fact only very few decisions of Greek tribunals adopted the release of the promisor from his obligation in cases of excessive difficulty of performance—and these decisions were chiefly issued by courts of first instance. Generally speaking, the practice of the Greek Courts of Appeal and of the Areopagus (Cassation Court) persisted in the acceptance of the principle of Culpa and until recently continued to use this principle in order to decide whether or not the promisor was responsible for damages in cases of non-performance. Conceptions like the ' excessive difficulty of performance ' or the ' Unzumutbarkeit der Leistung ', independently of the principle of Culpa, have never been adopted by the Greek court practice, even during the enemy occupation of 1941–1944, when the devaluation and annihilation of the currency value strongly demanded a different solution.

The framers of the new Greek Civil Code were fully aware of all the movement around them in continental legal systems toward the adoption of unforeseen changes of circumstances and excessive difficulty in performance as causes of frustration of a contract. Consequently they tried to formulate a provision on the lines of the French ' théorie de l'imprévision ' and of the German ' Unzumutbarkeit der Leistung ', which could be adopted into the whole system of the consequences of non-

[8] There are several articles favourable to the principle of frustration published in Greek periodicals by Professors C. Triantaphyllopoulos, G. Balis, G. Maridakis, A. Ligeropoulos, and others, and there were many special laws enacted recognising a reduction in rental or damages, especially in contracts of letting and hiring and contracts of employment and services in which the Greek State was interested, *e.g.*, Laws No. 409 of 1914, 842 of 1917, 5505 of 1932, etc.; see A. Gazis, *op. cit.*, pp. 79 *et seq.*

performance of the contract, as laid down in the new Greek Civil Code.

As a matter of fact, the whole problem of non-performance and of impossibility of performance in the law of contracts has been simplified in the new Greek Civil Code. Instead of the delicate and dangerous distinctions of impossibility (original, supervening, objective, subjective) under the Pandectistic theory and the German Civil Code of 1900 (§§ 306, 307, 280, 275, 325, etc.) the Code has adopted a general rule that any *culpable* violation of the obligation by the promisor renders him responsible for damages (arts. 330, 335 *et seq.*, 340 *et seq.*, 349 *et seq.*, 360 *et seq.*, 380 *et seq.*, 383 *et seq.* of the new Greek Civil Code). Thus, the dangerous rule *impossibilium nulla est obligatio* and the misleading distinction between objective and subjective impossibility, which formed part of the Greek legal system before the advent of the Code, have been abandoned in the new Greek Code. Moreover, the Code has introduced some other alterations of, and additions to, the problem of non-performance, of impossibility and delay of performance, among which undoubtedly the most significant is the provision of article 388 in regard to the supervening change of circumstances and the excessive difficulty in fulfilment of the obligation.

Article 388 of the new Greek Civil Code runs as follows: 'In case of subsequent change in the circumstances on which the contracting parties, under consideration of the principles of good faith and of fairness in transactions, have mainly founded a reciprocal contract, the change being due to extraordinary and unforeseen events, and where because of such a change the obligation of the promisor—in comparison with the obligation of the promisee—has become excessively onerous to him, the court may, at the request of the promisor, reduce his obligation to the proper extent, or decree the discharge of the contract as a whole or to the extent of the non-performed part. In the case in which the discharge of the contract has been decreed, all the obligations arising from it cease to exist, and the parties are mutually obliged to return all they have received according to the provisions relating to unjustifiable enrichment'.

The essence of this provision was formulated as a general rule relating to all kinds of contracts (reciprocal or not) in article 94 of the draft to the new Greek Civil Code, and later in articles 225 and 226 of the draft to the Code of 1945—an article contained in the First Book of the Code, devoted to the

' General Principles '. Undoubtedly this was the right place for such a provision. The First Book of the Code contains provisions relating to contracts in general, and the problem of frustration is a problem relating not only to the so-called ' reciprocal ' contracts but a problem common to any kind of contract, ' reciprocal ' or not. Hence, the framers of the draft to the Code of 1940 and later the framers of the draft to the Code of 1945 were right in including this provision in the Book of the Code relating to the General Principles. However, the text of the Code of 1940, which after a strange development [9] became the text of the Code of 1946, now in force in Greece, unfortunately adopted this provision in the chapter relating especially to the law of the so-called ' reciprocal ' contracts (art. 388). So that it is now the duty of the Greek court practice to widen the interpretation of article 388 and apply the rules it contains not only to ' reciprocal ' but also to ' non-reciprocal ' contracts, *e.g.*, not only to contracts of sale, but also to gratuitous bailments.

The gist of the rule contained in article 388 is that in cases of a supervening change in the circumstances under which a contract was made, where these circumstances constitute the basis and foundation of this contract, the court may decree the entire or partial discharge of the contract if, in its opinion, the performance of the contract should not be claimed. It is thus decisive for the application of article 388, (a) whether the circumstances under which the contract was made have changed, owing to extraordinary, supervening and unforeseen events, and owing to the fault of neither party, (b) whether the equilibrium of the two obligations arising from a reciprocal contract has been disturbed to such an extent that the promisor's obligation has become excessively onerous to him. Literally, article 388 applies only in cases of an *a posteriori* (supervenient) frustration of the basis of the contract. The rule contained in article 388 must, however, equally apply in cases of excessive difficulty of performance existing at the time when the contract was made—a solution which emerges from the acceptance of the same general principle in both cases: the favour to the promisor and the respect for his sacrifice under the principles of justice and equity. Indeed, article 388 contains a provision in which the principles of justice and equity have found their most characteristic formulation, and,

[9] See P. Zepos, ' The new Greek Civil Code of 1946 ' in *Journal of Comparative Legislation*, Vol. 28 (1946), parts iii, iv, pp. 56 *et seq.*

being itself a limit on the application of the principle of *pacta sunt servanda*, it contains a provision which bears the seal and imprint of the other two fundamental principles which dominate any law of contracts, *i.e.*, the principle of good faith, of justice and equity, and the principle of favour to the promisor.

The limitation of the principle *pacta sunt servanda*, which is introduced by article 388 of the new Code into the Greek legal system, is accomplished through the court. Obviously the parties are free to settle their differences through a new contract in cases of supervening change of circumstances. Where, however, such a new agreement is unattainable, the settlement of the differences arising from the supervening change of circumstances is entrusted to the court. Indeed, as has been rightly emphasised, ' it may be best to leave the matter to the discretion of the courts to be dealt with in accordance with their view of the demands of justice in the particular circumstances '.[10] The court then operates, at the request of the interested parties, as the ' reasonable third party ', who, as in the English legal system, ' would consider the effect of the supervening circumstances as altering the obligation of one or both of the parties to such an extent as to make the contract no longer capable of being enforced '—an ' objective ', not a ' subjective ', view in the formation of the opinion of the court,[11] based on a ' formative ' power (Gestaltungsmacht) of justice in general. In fact, the judge is supposed to be not only an automaton in the application of a concrete legal system, but he also collaborates with the legislator and contributes to his task. He is a real interpreter of the system of law, who has not only to fill the ' gaps ' in a given legal system but who is also able to make alterations and even a total change in the conditions under which the obligations arising from a contract are to be carried out.

The results of this activity on the part of the court are, according to article 388, either an entire or partial discharge of the contract or a reduction of the promisor's obligation to the ' proper ' extent. Article 94 of the original draft to the Code and article 226 of the draft to the Code of 1945 recognised, moreover, another alternative open to the court in case of

[10] See H. C. Gutteridge, *Comparative Law*, 1946, p. 67; P. H. Winfield, in *Pollock's Principles of Contract*, 12th ed. (1946), p. 227; Hedemann in *Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 12 (1939), p. 729.

[11] See P. H. Winfield, *loc cit.*; G. C. Cheshire and C. H. S. Fifoot, *The Law of Contracts*, 1945, p. 367, in fine *et seq.*

discharge of the contract; it enabled the court to hold that a promisor who has been released from his obligation was liable to pay ' reasonable damages ' in accordance with the principles of good faith and equity. This latter alternative, however, although very useful, was not included in the text of article 388, according to which the court may now either discharge the contract, partly or as a whole, or reduce the obligation of the promisor to the proper extent. In the case of discharge of the contract as a whole, the frustration ' kills the contract itself and discharges both parties automatically '.[12] Where the court decides in favour of a partial discharge of the contract, that contract is partially void to the extent of its discharged part. Lastly, where the court decides for the reduction of the promisor's obligation to the ' proper extent ', this reduction means an alteration of the contents and of the function of the contract, an alteration imposed by the court at its free discretion, in accordance with the principles of good faith, justice and equity.

In case of discharge of the contract, the obligations arising from it cease to exist and, according to article 388, the parties are reciprocally obliged to return all they have received, and this return has to be in accordance with the detailed provisions of the Code relating to unjustifiable enrichment (Greek Civil Code, arts. 904–913).[13]

Thus, the general frustration clause contained in article 388 gives a solution to all the problems arising from the frustration of a contract which have been the subject of analysis and criticism both in the English and continental legal systems. In fact, the application of general clauses always involves a danger to any given legal system. However, the intervention of the court in the decision whether and how far a contract is to be discharged is a satisfactory solution to the problem of frustration. It is the only possible solution of a problem which arises from the requirements of a limitation to the principle *pacta sunt servanda*. The solution of this problem must also reckon with the possible corruption of promisors who may

[12] These are the words of Viscount Simon, L.C., in the *Joseph Constantine Case*, [1942] A.C. 154, 163; cf. A. D. McNair, *op. cit.*, p. 157.

[13] See the rule contained in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe Barbour, Ltd.*, [1943] A.C. 32, which overruled the rule contained in *Chandler* v. *Webster*, [1904] 1 K.B. 493, 499. Also see extension of the principle of the *Fibrosa Case* in the Law Reform (Frustrated Contracts) Act, 1943; cf. A. D. McNair, *op. cit.*, pp. 157, 169; Cheshire-Fifoot, *op. cit.*, pp. 375 *et seq.*; Winfield in *Pollock's Principles of Contract*, 12th ed., pp. 247 *et seq.*, where also see notes on Scots Law, American Law, and modern Roman Law.

easily accept obligations when they know that they can afterwards be released from them in cases of excessive difficulty in performance. Indeed, a certain corruption of promisors in the sense explained above and a certain hesitation of promisees to contract when they know that promisors may be released from their obligations in cases of supervening change of circumstances and of excessive difficulty in performance are the two main dangers accompanying every solution leading to the acceptance of the principle of frustration of contracts. Consequently, it is only by a reasonable application that article 388 may become a useful and not a detrimental provision for the indispensable security in transactions. Indeed, article 388 requires a certain degree of conservatism in its application by the courts if it is to prove a really useful and successful provision.

THE INDIAN NATIONAL ARMY TRIALS

ANY discussion of the Indian National Army (I.N.A.) trials, 1944–1946, raises problems of military law, constitutional law, international law and politics. Before considering the trials themselves a brief note is necessary of the history of the I.N.A.

At the outbreak of the Pacific war there were approximately 70,000 Indian troops in Malaya, and even before Singapore fell some 200 of them joined the Japanese under Major Fujiwara and took part in infiltration and propaganda activities. Singapore surrendered on February 15, 1942, and two days later the Indian troops were handed over to the Japanese as prisoners of war.[1] The Japanese transferred them to 'General' Mohan Singh—a captain in the 1/14th Punjab Regiment—who told them 'We are going to form an Indian National Army to fight for the independence of India. You must all join'.[2] Recruiting for this purpose was conducted by means of propaganda speeches and physical violence.[3]

The I.N.A. formally came into existence on September 1, 1942,[4] with Mohan Singh as G.O.C., but he was arrested by the Japanese in December,[5] when the I.N.A. suffered a temporary eclipse.[6] Matters were put on a new footing with the arrival in Tokyo of Subhas Chandra Bose in June, 1943. He immediately assumed political and military leadership of the Indian independence movement, and on October 21, 1943, announced the formation of the Provisional Government of Free India which 'is entitled to, and hereby claims, the allegiance of every Indian. . . . We call upon the Indian people to rally round our banner and strike for India's freedom'.[7] Two days later the Japanese recognised the Provisional Government, promising 'every possible co-operation and support in the Provisional

1 For an account of this ceremony see *Statesman* (India), November 22, 1945; evidence of S. M. Babu Ram.
2 *Transcript of proceedings of court martial of Captain Shah Nawaz Khan and others.* Opening address of Advocate General of India.
3 See comments below on trial of Subedar Shingara Singh, 5/14 P.R.
4 For documents relative to the I.N.A. see *Formation and Growth of the I.N.A.*, edited Durlab Singh, Lahore, 1946.
5 He remained in custody until after the Japanese surrender; under the policy concerning the I.N.A. he was not court martialled.
6 An account of this period of difficulty appears in *Jai Hind, the Diary of a Rebel Daughter of India.* Bombay, 1945. pp. 18 *et seq.*
7 *I.N.A. Defence* by Bhulabhai J. Desai, Delhi, 1946, p. 176.

Government's efforts to attain its object: Complete Independence of India'.[8] On October 25, 1942, the Provisional Government of *Azad Hind* (Free India) declared war on Great Britain and the United States of America. Within a matter of days Germany, Italy, Burma, Thailand, Croatia, Manchukuo, 'free' China and the Philippines accorded recognition, while felicitations and a large financial gift were sent by Irish Republicans,[9] and I.N.A. sources assert that Bose received a message of congratulation from the Government of Eire.[10] Shortly after this General Tojo announced that the Andaman and Nicobar Islands were to be ceded to the Provisional Government as Indian territory.[11] Although the administration was not free from Japanese interference, the Indian authorities were also made nominally responsible for the administration of the area round Kohima, captured by the Japanese in 1944, and printed their own stamps for the region, although these were never issued for use.[12] In January, 1944, I.N.A. forces were in action in the Kohima-Imphal area, but fell back when the Japanese retreated. By March, 1945, vast numbers of their officers and men were in British hands, and with the capture of Rangoon, May 3, 1945, the I.N.A. virtually ceased to exist, although some activities continued until the surrender of Singapore.

During 1943 and 1944 courts martial were taking place in India of those persons who had formerly belonged to the Indian and Burman armies, but had been captured fighting in the ranks of the I.N.A., or working on its behalf. At this time the fate of I.N.A. personnel did not involve any political issues or sympathies, for the attitude of the political leaders of India is well seen from a remark by Pandit Nehru: 'Three years ago I was asked in Calcutta what I would do if Subhas Bose led an army into India on the plea of liberating India. I replied then that I would not hesitate to resist this invasion even though I did not doubt that Subhas Bose and his Indian colleagues and followers were motivated by the desire to free India and were in no way mere tools of the Japanese. Nevertheless, they had put themselves on the wrong side and were

[8] *Jai Hind*, p. 69.
[9] *Jai Hind*, p. 73.
[10] *Deutsche Allgemeine Zeitung*, December 3, 1943, quoting *Domei News Agency* report, December 2, 1943, of message of thanks from Bose. The London office of the High Commissioner denies that the Government of Eire sent any such message to Bose.
[11] Exhibit UUUU, *Shah Nawaz Case*, cited in Desai, l.c., p. 13.
[12] *Stamp Collecting*, London, November 10, 1945. Used by Mr. Desai as evidence of civilian governmental activities, Desai, l.c., p. 21.

functioning under Japanese auspices. No person could come to India in this way under such foreign auspices. Therefore, whatever the motive behind these people they had to be resisted in India or outside '.[13]

In these early trials the charge sheets were comparatively simple and the evidence fairly straightforward, while few problems of law were involved. Generally speaking, the charge was of *Committing a Civil Offence* contrary to section 41 of the Indian Army Act (I.A.A.)[14] or section 41 of the Burma Army Act (B.A.A.),[15] as the case might be. The particular civil offence alleged was *Waging War Against the King* contrary to section 121 of the Indian Penal Code (I.P.C.)[16] and the Burma Penal Code[17] respectively, the penalty for which is death or transportation for life, and liability to a fine. There is no offence of treason under the Indian Penal Code and ' waging war ' serves in its place. The words ' seem naturally to import a levying of war by one who, throwing off the duty of allegiance, arrays himself in open defiance of (his) Sovereign in like manner as a foreign enemy would do '.[18] ' Waging ' is used in the same sense as is ' levying ' in the English statute of 1351.[19] In this connection it must be borne in mind that ' an assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percussum*. Lifting and marching are sufficient overt acts without coming to a battle or action '.[20] To constitute the offence no specified number of persons is necessary, and so an individual found carrying arms on behalf of the enemy may be charged with waging war contrary to section 121.

An interesting line of defence was attempted in one of the I.N.A. courts martial that took place towards the end of 1944. In that case, a member of the Burma Frontier Force who had been left behind when the British withdrew from Myitkyina was the accused. That particular Force was part of the Burmese police forces and was disciplined in accordance with the Burma Frontier Force Act, 1937.[21] After the Government of

13 From speech by Nehru reprinted in *Patriots not Traitors*, edited by D. Y. Dev (New Delhi, 1945), p. 3.
14 India Act, No. VIII of 1911.
15 The I.A.A. was made applicable to the Burma Army by the Government of Burma Adaptation of Laws Order, 1937 (S.R. & O., No. 265, 1937, p. 19), and the Burma Laws Adaptation Act, 1940.
16 India Act, No. XLV of 1860.
17 The I.P.C. was extended to Burma by S.R. & O., No. 265, 1937, p. 70.
18 Indian Law Commission, 2nd Report, s. 10.
19 25 Edw. 3, st. 5, c. 2.
20 *Law of Crimes*, by Ratanlal and Thakore, Bombay, 1936, p. 274.
21 Burma Act, No. I of 1937.

Burma had established itself in Simla, a Notification was issued by the Governor of Burma under B.A.A., s. 5 (1),[22] making the Burma Frontier Force subject to the Burma Army Act.[23] The defending officer declined to plead guilty or not guilty, but submitted, instead, a plea to the jurisdiction. In the first place he argued that as the accused was a member of a police force it was not illegal for him to obey orders of the occupying authority in connection with ' public order and safety ',[24] and that any policeman serving under the occupying authority could, for this purpose, take an oath of obedience to such authority.[25] The other argument used in support of this plea was that the maxim *ignorantia juris neminem excusat* was not an irrebuttable presumption. He pointed out that the Burma Frontier Force was brought within the terms of the Burma Army Act subsequent to the fall of Myitkyina, and that the Governor's Notification was published after the accused had fallen into Japanese hands. The circumstances therefore were such that no knowledge of this Notification could have been acquired by the prisoner. The Notification was published in Simla, while the prisoner was in Burma at a place so completely in the control of the enemy that there was no means whatsoever of his obtaining knowledge of the new legal position of the Force of which he was a member. His contention was that English principles of law did not automatically apply to a court-martial under the B.A.A., and a more liberal interpretation of the maxim should be applied. In support of this plea he cited Roman Law, which permits ignorance of law as a defence to minors, women and soldiers,[26] and he also made reference to *R.* v. *Bailey*, 1800,[27] of which the headnote runs as follows: ' A prisoner was indicted for maliciously shooting; the offence was within a few weeks after the 39 Geo. 3, c. 37, passed, and before notice of it could have reached the place where the offence was committed. On case, the judges thought he could not have been tried if the 39 Geo. 3, c. 37, had not passed, and as he could not have known of that Act, they thought it right he should have a pardon '. Both these lines of argument were rejected by the Judge Advocate in the case, as was the plea to the jurisdiction. The accused was found guilty and sentenced to transportation for life.

[22] ' The Governor may, by notification, apply all or any of the provisions of this Act to any force raised and maintained under the authority of the Governor '.
[23] Defence Dept., Army Branch, Notification No. 92, dated September 29, 1942.
[24] Hague Convention IV, Art. 43.
[25] Oppenheim, *International Law*, 5th ed., Vol. 2, s. 171.
[26] *Digest*, XXII, 6, 9.
[27] Russ. & Ry. 1.

After March, 1945, the number of officers and men captured made a selective policy necessary in order to determine who among them should stand trial by court martial in the future. Courts-martial were to be confined to the more important I.N.A. officers, especially those against whom charges of brutality, murder or atrocities could be brought. This article deals with three of these cases: the first, that of Captain Shah Nawaz Khan, 1/14 P.R., Captain P. K. Sahgal, 2/10 Baluch. Regt., and Lt. Gurbakhsh Singh Dhillon, 1/14 P.R.; second, Captain Abdul Rashid, 1/14 P.R.; and finally, Subedar Shingara Singh, 5/14 P.R., and Jemadar Fateh Khan, 5/14 P.R.

In view of the importance of the accused and the nature of the charges against them, it was decided to hold these trials in India's 'Tower of London', the Red Fort in Delhi, from which Bose had intended announcing his victory. The first trial commenced in the midst of the Indian elections, and all parties used sympathy for the I.N.A. officers due to stand trial as part of their political platform. The Indian press immediately compared the failure of the I.N.A. to wrest power from the British to the failure of the Indian Mutiny in 1857, while the trial itself was compared to the court-martial of Bahadur Shah, titular king of Delhi during the Mutiny, who was sentenced to transportation for life and died an exile in Rangoon. 'Both trials drive home the basic truth that whether the participants in a revolution or a war of independence are "patriots" or "traitors" is determined by their success or failure.'[28] The complexity of these courts-martial made it unlikely that a military officer would be competent, however high his legal qualifications might be, to appear for either defence or prosecution unaccompanied by counsel. Provision is made by I.A.A., rule 82 (a) for counsel to appear whenever 'the Commander-in-Chief in India or the convening officer declares that it is expedient'. In a note explaining this rule the *Manual of Indian Military Law* points out that 'there is no restriction as to the number of counsel engaged in a case. Counsel for the defence, though not bound to such strict impartiality as the prosecutor, must nevertheless recollect that he is assisting in the administration of justice and must not be guilty of any unfairness or want of candour in his conduct of the case. In his address he will have the same liberty as the accused; but

[28] *Hindustan Times, Evening News*, Nov. 5, 1945, p. 4.

he should exercise more restraint in commenting on the acts of persons not before the Court '.[29]

The importance attached by the Government of India to the first of these courts martial is seen from the fact that Sir Noshirwan P. Engineer, Advocate General of India, was named as counsel for the prosecutor. The political importance of the trial from the Indian point of view is evidenced by the establishment under Congress auspices of an I.N.A. Defence Committee which undertook to defend any I.N.A. personnel who called upon them to do so. For the first trial, some two dozen counsel were named, the senior of whom was Sir Tej Bahadur Sapru. He was accompanied by, among others, Pandit Nehru, who, despite his earlier condemnation, ' donned after thirty years his barrister's gown and white band as a defence counsel ',[30] although he took no active part in the defence and only appeared for short periods on two or three occasions; Dr. Khatju, a one-time Minister of Justice; Mr. Asaf Ali, now Indian Ambassador in Washington; two ex-judges of the Lahore High Court and one of the Patna High Court. Together with these there appeared Mr. Bhulhabhai J. Desai, who was responsible for the actual conduct of the defence.

One of the most interesting features in the court-martial of the three officers lay in the diversity of their religions; Shah Nawaz was a Muslim, Sahgal a Hindu, and Dhillon a Sikh. Thus, the three major religions of India, and, one might assume, the political associations connected therewith, were affected; nevertheless, all three elected to be defended by the Congress Defence Committee and no member of the Muslim League was associated with the defence counsel. Further interest was aroused by the personnel of the court[31]: the President was a Major-General, and sitting with him were a Brigadier, three Lieutenant-Colonels and two Majors, while the Judge Advocate was a Colonel. The accused, too, according to the defence witnesses, were senior officers, Shah Nawaz and Sahgal being described as Major-Generals and Dhillon as a Colonel, the ranks being those they held in the I.N.A. The charge sheet[32] consisted of ten charges, not all of which were

[29] *M.I.M.L.*, 1937, p. 293.
[30] *Evening News*, *l.c.*, p. 1. See also p. 2. ' When did Pandit Nehru last appear in a court—not as accused but as barrister? It must have been well over twenty-five years back, for he was one of the earliest to respond to Mahatma Gandhi's boycott call to lawyers in 1920 '.
[31] The Convening Order for this court martial is reprinted in Desai, *l.c.*, xiii.
[32] The Charge Sheet appears in Desai, *l.c.*, xv–xvii.

against the three accused jointly. All were charged with waging war contrary to section 121, I.P.C.; four charges of murder contrary to section 302, I.P.C., were presented against Dhillon, in the abetment of which Sahgal was charged under section 109, I.P.C., while one charge of abetment contrary to section 109, I.P.C., was presented against Shah Nawaz.[33] The various charges may be summarised as follows. Waging war consisted of planning, organising and participating in military operations between September, 1942, and April, 1945. The evidence brought forward consisted of military orders, operation orders, and personal diaries prepared by the accused, and was strengthened by the personal accounts of those who heard their propaganda speeches or served under their command. The murder and abetment charges concerned the shooting of members of the I.N.A. for desertion and attempting to communicate with the enemy in the Popa Hill area of Burma in February, 1945, contrary to I.N.A. Act, s. 35,[34] and I.N.A. Act, s. 29 (*c*).[35] The written evidence supporting these charges were crime reports bearing Dhillon's signature as sentencing officer, and Sahgal's (or Shah Nawaz's) as confirming authority.[36] Evidence of these death sentences having been carried out was given by witnesses who had been members of the actual firing squads.[37]

In his opening address the Advocate General dealt in advance with any possible line of defence that might suggest that the actions of the accused were legal within the terms of the Indian National Army Act and so excepted from the Indian Penal Code and the Indian Army Act. The Advocate General contended that 'An act of treason cannot give any sort of rights nor can it exempt a person from criminal responsibility for the subsequent acts. Even if an act is done under a command, where the command is traitorous, obedience to that command is also traitorous. It is submitted that the

[33] 'Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence'. S. 109, I.P.C.

[34] 'Any person subject to this Act who deserts or attempts to desert the service, shall, on conviction by a Court-Martial, be punished with death, or such less punishment as is in this Act mentioned'. (I.N.A. Act, s. 35.)

[35] 'Any person subject to this Act who . . . directly or indirectly holds correspondence with or communicates intelligence to the enemy or any person in arms against the I.N.A. or I.I.L., shall, on conviction by a Court-Martial, be punished with death, or with such less punishment as is in this Act provided'. (I.N.A. Act, s. 29 (*c*).)

[36] Those concerning Dhillon and Sahgal are reproduced in Durlab Singh, *l.c.*, pp. 102, 141.

[37] See, *e.g.*, evidence of Jagiri Ram, *Evening News*, November 30, 1945.

accused cannot in law seek to justify what they did as having been done under the authority of the I.N.A. Act. No authority purporting to be given under that Act can be recognised by this court or indeed by any court of this country. The assumption of any such authority was illegal from the beginning. Any tribunal or authority purporting to be established under that Act would be in repudiation of the allegiance which is inherent in a court of the country. Those who instituted or took part in the proceedings were themselves liable to be punished for offences against the State. All orders under the I.N.A. Act or by any tribunal or authority purporting to be established by it are without sanction. They cannot protect the persons who made such orders or acted upon them '.[38] The Advocate General was not speaking without the authority of precedent when he made this comment, for ' a soldier, who commanded the guards at the trial and execution of Charles I, pleaded at his trial that all he did was as a soldier by the command of his superior officer whom he must obey or die. It was resolved that that was no excuse, for his superior was a traitor, and all who joined with him in that act were traitors and where the command is traitorous the obedience to that command is also traitorous '.[39]

A vast number of prosecution witnesses were called who gave evidence of the history and growth of the I.N.A. and the Provisional Government, and of the active operational role played by units of the I.N.A., together with activities of each of the accused in connection therewith. In addition, evidence was led of the existence of an I.N.A. concentration camp and of the treatment meted out there, together with accounts of general victimisation, even to the extent of opening fire on large numbers of Gurkha and Muslim prisoners who refused to volunteer for the I.N.A. It was not suggested that the accused officers had themselves participated in the perpetration of such atrocities, but the Advocate-General contended that the evidence showed that what went on in such concentration camps was of such common knowledge among volunteers and non-volunteers alike that the accused must, especially in view of their responsible positions in the I.N.A., have been fully aware of these conditions, and acquiesced in their continuance. He maintained, therefore, that such evidence was part of the general *res gestae.*

The evidence of the defence witnesses was intended to show

[38] *Hindustan Times*, November 6, 1945, p. 4.
[39] *Axtell* (1661), Kelyng 13, cited in Ratenlal, *l.c.*, p. 147

that the I.N.A. grew from a spontaneous desire for independence,[40] and that the I.N.A. and the Provisional Government were independent agents free of any Japanese control and entitled to be regarded as an army and a State in international law which conducted its warfare and its governmental and diplomatic activities fully in accordance with international law and state practice. In order to prove this, both military and civilian personnel of the I.N.A. and the Provisional Government were called, together with Japanese officials. The defence concerning the atrocities varied with the atrocity charged. As a general principle it was contended that absolutely no coercion was used against anybody to get him to join the I.N.A.[41] Mr. Desai argued, in connection with the occasions on which fire was opened against non-volunteers, that this was resorted to by a small number of men in self-defence after a 'free fight' had broken out in connection with attempts to arrest ringleaders of illegal action.[42] As regards the general ill-treatment, his contention was that the concentration camp was really a detention camp to which persons were sent as punishment for ordinary criminal offences; there they were made to do fatigues, but were not excessively ill-treated. He contended that their accounts were fabrications designed to hide their own activities.[43]

It became evident in the course of the proceedings that the defence intended treating the Shah Nawaz court-martial more or less as a test case[44]; for 'here is a case . . . that is not at all a case of what you might call three individuals waging war against the King. The evidence amply bears out the fact that these men charged before you were a part of an organised army which waged war against the King even according to the Prosecution. Therefore the case before the Court is not a personal case of any kind or sort. The honour and the law of the Indian National Army are on trial before this Court'.[45] For this reason an attempt was made to prove that in international law the Provisional Government of Free India was the recognised Government of a recognised sovereign State, with the I.N.A. as its regular armed forces fighting under

[40] 'The recruitment was absolutely voluntary. We had surplus volunteers whom we could not train or arm'. D.W.6, quoted Desai, *l.c.*, p. 102.
[41] 'The I.N.A. was purely voluntary. As far as I am aware no coercive methods were used in recruiting. I am a member of the Provisional Government'. D.W.7, Desai, *l.c.*, p. 102.
[42] Desai, *l.c.*, p. 101.
[43] Desai, *l.c.*, pp. 101, 108–109.
[44] Desai, *l.c.*, reproduces the entire text of defence counsel's closing address.
[45] Desai, *l.c.*, p. 2.

legitimate orders according to the rules of war. Mr. Desai argued, therefore, that persons carrying on military activities under the authority of the Provisional Government and the I.N.A. were beyond the jurisdiction of municipal law. 'Having regard to the condition in which this Free Government of India had been formed and was functioning, it was entitled to make war and it did make war for the purpose of liberating this country. That is the first and the main issue before the Court. This Court is trying civil offences under the Indian Penal Code, and there are two ways of looking at this question. One is that when two States declare a war—and I may assume for the purpose of this argument . . . that in the condition in which the new Indian State found itself, it was in a position to declare war—and having declared war, in so far as any acts in the prosecution of that war are concerned, they are outside the pale of municipal law. . . . Alternatively . . . under section 79, I.P.C.,[46] the acts done in due prosecution of the war were not offences. . . . It is unthinkable that any member of any organised army could be charged with an offence merely because he fought . . . men belonging to an army of the State with which he is at war. . . . The question which we have got to bear in mind is: Was that act done in due prosecution of the war which one State declared upon another?'[47] It was obvious that the defence turned on the issue whether the accused officers were in fact traitors under the Indian Army Act or soldiers under the I.N.A. Act and citizens of a State able to declare and conduct war on its own behalf. This issue could only be proved by reference to international law, for, as counsel for the defence put it, 'What is now on trial before the court is the right to wage war with immunity on the part of a subject race for their liberation. I shall be able to cite authorities on international law that a nation or part of a nation does reach a stage where it is entitled to wage war for its liberation',[48] and he went on to assure the court that he would be able to prove this to their complete satisfaction; but, as the verdict shows, he failed in his object.

It is now necessary to examine some of the problems in the light of international law. The two major problems raised were those of belligerency and recognition. The defence

[46] 'Nothing is an offence which is done by any person who is justified by law . . .'.
[47] Desai, *l.c.*, pp. 21–23.
[48] Desai, *l.c.*, p. 2.

counsel made great play of the fact that the Japanese authorities ceded territory to the Provisional Government, though some of it, as in Manipur and Vishnapur, was only ' administered for a period of four to six months '.[49] He maintained that the territory was handed over and was in the complete sovereignty of the Indian National authorities, but as has already been pointed out, the Indian Commissioner was by no means free of Japanese control. Concerning the short period during which this territory was held by the Provisional Government, Mr. Desai argued, ' the duration of administration has no bearing on this issue for indeed it can happen, as it did happen in this war, that territories were as easily acquired as lost. This court is not concerned with the question of duration '.[50] It is submitted that his reference to the recent war was not apposite, for a State that is already a subject in international law and has possessed territory but lost it in war is not in the same position as a group of persons describing themselves as a government, who, due to the fortunes of war, find themselves temporarily in possession of territory only to have it taken from them by the original sovereign. Counsel quoted at length various text-book definitions to show what were the requirements of statehood and war and referred to the position of the Polish National Army in 1917 and the recognition of the Czecho-Slovaks as co-belligerents in 1918 : ' Recognition by third States is not as a rule binding upon the parent State. Notwithstanding such recognition, it is entitled to treat insurgents as traitors. But the position is controversial with regard to recognition as a belligerent Power granted to separate armies which comprise subjects of the enemy fighting to free their nation from his rule and which are responsible to an authority recognised as representing the nation in question. . . . The better opinion is probably that when such recognition is granted by the adversary to large bodies of men effectively organised on foreign soil in anticipation of independent statehood, a point is reached at which the belligerent confronted with the disaffection and desertion of a considerable number of his subjects engaged in hostilities against him can no longer, without exposing himself to justifiable retaliation, assert the provisions of his own criminal law as the only legally relevant element in the situation '.[51] The I.N.A. was granted recognition by the adversary, for as

[49] Desai, *l.c.*, p. 13.
[50] Desai, *l.c.*, p. 17.
[51] Oppenheim, 6th ed , Vol. 2, s. 76a, cited Desai, *l.c.*, pp. 47–48.

Mr. Desai pointed out,[52] ' this Government was recognised by the Axis powers '. He went on to argue that this ' recognition is proof and more than proof that it had the right to declare war. . . . The recognition is but a proof of what I may call a statehood which gives it the capacity of making and declaring war '.[53] What counsel failed to point out was that the authority he had cited as ' the better opinion ' was only the opinion of one authority, and that others did not accept this line of argument.[54] The Provisional Government of Free India may have been an independent State and a subject of international law from the standpoint of those governments which had granted it recognition, but ' until a subject of international law chooses to recognise a new State, it has the right to ignore it and may not be held to have undertaken obligations towards an entity which, in so far as that existing subject of international law is concerned, does not exist before the recognition '.[55] Furthermore, in its decision in the case concerning *Certain German Interests in Upper Silesia*, 1926, the Permanent Court of International Justice dealt with the relations between two States, one of which was recognised by some States but not by the State with which it was actually in dispute. The court pointed out that : ' The principal Allied Powers had, it is true, recognised the Polish armed forces as an autonomous, allied and co-belligerent (or belligerent) army. This army was placed under the supreme political authority of the Polish National Committee with headquarters in Paris. Without considering the question what was at this moment the political importance of this Committee, the court observes that these facts cannot be relied on as against Germany, which had no share in the transaction '.[56] The court further pointed out that Poland was not even a party to the Armistice Convention with Germany, for at the time of its conclusion ' Poland was not recognised by Germany : it is, however, only on the basis of such recognition that an armistice could have been concluded between those two Powers '.[57] It is submitted that if recognition is a condition precedent to a State's ability to conclude an armistice with a belligerent, it is equally requisite for a condition of war to exist, or, in fact, for a State to call itself a State and be treated as such.

[52] Desai, *l.c.*, p. 7.
[53] Desai, *l.c.*, pp. 7–8.
[54] See, *e.g.*, Oppenheim, 5th ed., Vol. 2, s. 76a.
[55] *International Law*, by G. Schwarzenberger, Vol. 1, p. 55.
[56] A/7, p. 28.
[57] A/7, p. 27.

The court decided that it was unable to accept the arguments raised by the defence and found the accused guilty of the charges against them and sentenced all three to death. However, the Commander-in-Chief in India, as confirming officer, reduced the sentence in each case to cashiering. This ignominy automatically attaches to any sentence of imprisonment imposed on an Indian commissioned officer,[58] but in this case there was no sentence of imprisonment attached. The effect of this judgment and the reduction of the sentence caused no small stir in India, with official military circles and the Congress Party both being attacked, while the whole of the first trial was described as 'a sorry business'.[59] 'Of the Congress Party's propaganda we find difficulty in writing with restraint. Initially came some balanced statements from leaders such as Pandit Nehru, who described the I.N.A. as having functioned "under Japanese auspices", and recognised that its members, whatever might be their idealistic motives, were mistaken. But such utterances were soon replaced by an unchecked and hysterical campaign of publicity which sought to paint the entire I.N.A. as heroes, to the implied demerit of the Indian Army. . . . The motive seems in the main to have been mere electioneering. . . . Similarly in commentary upon G.H.Q.'s conduct, we find it hard to maintain temperate phrasing. If this tragic *tamasha* was destined to terminate in the court-martial's legally unavoidable sentence being overthrown, and the accused being let off by special order of the C.-in-C., was it not a major strategical blunder to have staged it at all? Did not its staging in the Delhi Red Fort—of all places—betray astonishing lack of tactical and historical sense? Why should the officers first brought to trial not have been those who had done deeds of gross brutality?' The only person who seems to have emerged unscathed is the C.-in-C., for 'in Sir Claude Auchinleck India has a fine C.-in-C. of liberal mind, who once again, in the finale of this sorry business, has shown unusual capacity for response to the currents of Indian emotional opinion'.[60] It had become evident during the trial that newspaper editors were not the only persons worried about the situation and the popular emotion aroused by it. A new policy was announced in a Government communique to the effect that future trials would be confined

[58] I.A.A., s. 47a: 'Whenever an Indian commissioned officer is sentenced to transportation or imprisonment, the court shall, by its sentence, sentence such officer to be cashiered'.
[59] *Statesman*, January 5, 1946, editorial.
[60] *Statesman*, *l.c.*

to persons against whom there was prima facie evidence of acts of brutality, the Government ' are confident that public opinion will support them in this decision. . . . In reviewing any sentences which may be passed by courts-martial whether in the present or any future trials, the competent authorities will have regard to the extent to which the acts proved offend against the canons of civilised behaviour '.[61] The two other trials by court-martial with which this article deals were both held under this new policy directive, and the accused were charged with being personally responsible for the perpetration of atrocities.

The court-martial of Captain Abdul Rashid presented features somewhat different from those of the *Shah Nawaz Case*. In the case discussed above the main charge was that of waging war, and the defence was conducted with the idea of overcoming this political charge by proving the legality of the I.N.A. The accused in the present case had held the rank of major in the I.N.A. in which organisation his appointment was deputy provost marshal.[62] His duties, as such, included command of the I.N.A. concentration camp, and it was in connection with atrocities alleged to have taken place there and elsewhere, with his knowledge or in his presence, that Abdul Rashid was now standing trial. It is true that a charge of waging war was included in the charge sheet against this officer, but this charge was not pressed and no special evidence brought to support it. It would be enough to constitute a verdict of guilty on this charge if the charges of cruelty were proved, for these charges were brought under section 327 or section 329 of the Indian Penal Code, that is to say, voluntarily causing hurt, or grievous hurt, for the purpose of constraining the sufferer to commit an illegal act, namely wage war against the King by joining the I.N.A.[63] Charges of abetment contrary to section 109 were also alleged. These activities were clearly for the purpose of advancing the I.N.A. and were, therefore, part of the comprehensive offence of waging war.

Public interest was aroused by the fact that Captain Rashid was a Muslim whose defence was being undertaken by the Muslim League, without any assistance from Congress lawyers.

[61] *Hindustan Times Evening News*, November 30, 1945, p. 1.

[62] See Annexure (a) to *Military Bureau Gazette*, Serial No. 9 (2), dated April 17, 1943, reproduced in Durlab Singh, *l.c.*, p. 20.

[63] ' Whoever voluntarily causes hurt for the purpose . . . of constraining the sufferer . . . to do anything which is illegal, . . . shall be punished with imprisonment . . . which may extend to ten years ': s. 327. S. 329 allows transportation for life if the accused ' voluntarily causes grievous hurt ' for the same purpose.

Further, Captain Rashid, unlike the accused in the other cases, appeared in court wearing his badges of rank as an officer of the Indian Army. The witnesses who gave evidence against this officer included a number of Muslim troops, and all testified to witnessing or suffering beatings administered by him, or in his presence, or on his orders. In each case they spoke of promises to cease the ill-treatment if they agreed to join the I.N.A. The accused did not call any witnesses in his defence, and as he could not give evidence in his own behalf,[64] merely took advantage of his right to make a statement.[65] From this statement it appeared that Rashid's loyalty to the King was as strong as ever, for he asserted that he joined the I.N.A. in order to protect Muslim troops from being victimised by the Hindu *raj* in that organisation. One might inquire whether his beatings of Muslim sepoys constituted Hindu victimisation. It is also legitimate to inquire how Rashid made this line of argument, and his employment of Muslim League defence counsel, compatible with the guiding principles of the Indian Independence Movement laid down at the Bangkok Conference, at which Muslims were adequately represented. There it was resolved: 'That India be considered as ONE, and indivisible. That all activities of this Movement be on a national basis and not on sectional, communal or religious bases. That in view of the fact that the Indian National Congress is the only political organisation which could claim to represent the real interests of the people of India, and, as such, acknowledged as the only body representing India, this Conference is of the opinion that the programme and plan of action of this Movement must be so guided, controlled and directed as to bring them in line with the aims and intentions of the Indian National Congress'.[66] In addition, we learn from a document signed by the entire personnel of the Provisional Government, including its Muslim members, that: 'The Provisional Government is entitled to, and hereby claims, the allegiance of every Indian. It guarantees religious liberty, as well as equal rights and equal opportunities to all its citizens'.[67] In view of these extracts it can only be assumed that the accused did not believe the

[64] M.I.M.L., p. 49, para. 99.

[65] 'If he is represented by Counsel . . . the accused may make a statement giving his account of the subject of the charge against him. This statement may be made orally or in writing but the accused shall not be sworn and no question may be put to him by the court or by any other person': I.A.A. Rule 47 (B) (ii) (*a*).

[66] Bangkok Resolutions, No. 6 (b) (c) (d) (from text in author's possession).

[67] *Proclamation of the Provisional Government of Azad Hind*, October, 21, 1943, reproduced in Desai, *l.c.*, pp. 173–177.

promises of the new government to whom he had sworn allegiance; or that his allegiance meant nothing and he only joined the I.N.A. because life as one of its officers would be easier than as a prisoner of war; or else that he was a coward who thought this communal line of defence might serve to mitigate his punishment. The court-martial found Rashid guilty of most of the charges against him and the C.-in-C. as confirming authority sentenced him to seven years' imprisonment. The effect of the sentence in this case was very different from that of the *Shah Nawaz Case*. Muslim riots broke out throughout India and even railway carriages bore the slogan 'Release Abdul Rashid'. The line of argument used was an application of Rashid's communal defence, namely that he was being victimised because he was a Muslim defended by the Muslim League.

The last court-martial with which this article deals was that of Subedar Shingara Singh, a Sikh, and Jemadar Fateh Khan, a Muslim, both of whom were defended by the Congress defence committee. These two Viceroy's Commissioned Officers had been captains in the I.N.A. and for a long while had been in command of the concentration camp at Bidadari where, unlike Rashid, they both resided. Eight charges were presented against both accused jointly, comprising three charges of murder contrary to section 302,[68] two of voluntarily causing grievous hurt by beating contrary to section 329, two of abetment contrary to section 109, one of an offence contrary to section 329 and the other contrary to section 327, and finally waging war against the King contrary to section 121 of the Indian Penal Code. As with Rashid the waging war charge was not pressed, although both men had been captured before the fall of Singapore and it was suggested that both had been members of the 'Fujiwara Volunteers'.[69]

In this case the dates of charges were important. It was alleged that the three murders were committed on August 24, 1942, the two beatings on the same day, and the two charges of abetment related to events in September, 1942, while the waging war was alleged to have continued from September, 1942, to the end of April, 1943. By I.A.A., s. 67,[70] there is a time bar of three years preventing a trial by court-martial

[68] 'Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine': s. 302, I.P.C.

[69] See *Transcript of Proceedings*, evidence of P.W.9.

[70] 'No trial by court-martial of any person subject to this Act for any offence, other than an offence of mutiny, desertion or fraudulent enrolment, shall be commenced after the expiration of three years from the date of such offence.'

save for some few specified offences with which the accused were not charged; nevertheless, their court-martial did not commence until December 15, 1945, which was beyond the statutory time limit. This limitation of trial by court-martial had been dealt with by the promulgation of an Ordinance [71] by the Governor-General in exercise of his powers under the Government of India Act, 1935.[72] By this Ordinance, I.A.A., s. 67, was amended to read: 'No trial by court-martial of any person subject to this Act for any offence, other than an offence committed after the 7th day of December, 1941, while the person in question was a prisoner of war or was present in enemy territory, or an offence of mutiny, desertion or fraudulent enrolment shall be commenced after the expiration of a period of three years (in the computation of which period any time spent by the person in question after the aforesaid date as a prisoner of war or in enemy territory or in evading arrest shall be excluded) from the date of such offence'. The Ordinance declared, 'and "enemy territory" means any area at the time of the presence therein of the person in question under the sovereignty of or administered by or in the occupation of a State at that time at war with His Majesty'.

No sooner had the trial of these two men commenced than defence counsel submitted a plea to the jurisdiction alleging that the Ordinance was *ultra vires*. He contended that section 67 could not be amended, in so far as these charges were concerned, more than three years after the acts were alleged to have been committed. His argument was that the Ordinance was retroactive in operation. What he failed to observe was that the Ordinance did not revive a time-barred crime, but removed a time-barred procedural limitation allowing a case to be tried by a court whose jurisdiction would otherwise have lapsed. His second submission was that the terms of service under the Indian Army Act could not be amended by the Legislature or the Governor-General to affect a man who had enrolled prior to such amendment, for the

[71] Indian Army and Indian Air Force (Amendment) Ordinance, 1945. (Ordinance No. XLII of 1945 published in the *Gazette of India Extraordinary*, dated October 31, 1945.)

[72] 25 & 26 Geo. 5, c. 42. 'The Governor-General may, in case of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an act passed by the Governor-General in Legislative Council'. 9th Sch., s. 72, reproducing s. 72, Government of India Act, 1915 (5 & 6 Geo. 5, c. 61). By the India and Burma (Emergency Provisions) Act, 1940, s. 1 (3), the limitation of effectiveness to a period of six months is removed (3 & 4 Geo. 6, c. 33).

Indian Army Act ' was, so to say, the charter by which he was going to be bound throughout his military career. Having enrolled into the Act, . . . I say, as a matter of law, that it is not competent as regards a person who was enrolled after 1911, that the Army Act should be amended either by the Legislature or the Governor-General in any way which might be prejudicial to the terms under which he was enrolled '.[73] Were such an assertion accepted as a true statement of the legal position, the implications would be disastrous, and the power to amend legislation virtually whittled away to nothing. This submission by the defence was rejected by the Judge Advocate in the following terms: ' While I agree with the defence's submission that a person who enrols into the Indian Army must be deemed to have knowledge of the various provisions of the I.A.A., I also think that that same person must be deemed to know that the Act under which he is enrolled, is liable thereafter to be amended from time to time. Acts are constantly being passed which vary the rights and liabilities of those persons whom they affect, and the position would indeed be intolerable if a soldier had to be discharged and re-enlisted in order to subject him to an amended provision of the I.A.A.'.[73] Furthermore, it is submitted that I.A.A., s. 67, cannot be construed as a contract between the Crown and the soldier, but merely places a statutory restriction upon the army's right to try offences by its own courts, and as such, is of absolutely no concern of the soldier.

Dr. Khatju, who led the defence for this purpose, next complained that ' in this Ordinance provisions have been definitely made for the purpose of striking these two accused and people of that class '. This particular point was adequately dealt with by the counsel for the prosecutor who cited the Lahore Conspiracy Case Ordinance, 1930, which was promulgated to deal only with the case of the accused in a certain named case, while, as was pointed out by the Judge Advocate, ' It may well be that the purported amendment of I.A.A., s. 67 (by Ordinance XLII of 1945), will, quite apart from the present trial and other trials of the same category, enable courts-martial to try numerous soldiers from among recovered prisoners of war for serious military offences, whereas without such purported amendment the trial of such men by court-martial would have become time-barred '.[74] Defence counsel

[73] *Transcript of proceedings of court martial of Subedar Shingara Singh*, December 15, 1945.
[74] *Transcript*, *l.c.*, December 17, 1945.

finally argued on this point that at the date of the promulgation of this Ordinance, that is to say, after the termination of all hostilities in which India was participating, there was, in fact, no emergency existing and the Ordinance was therefore not necessary 'for the peace and good government of British India'. Dr. Khatju went so far as to assert that 'so far as peace and good government are concerned I say that peace and good government instead of being promoted by this Ordinance are being gravely put in jeopardy'.[75] The Judge Advocate advised the court to reject the submission of the defence on the strength of *Bhagat Singh* v. *The King*,[76] in which Viscount Dunedin pointed out that 'A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action, which is to be judged as such by someone. It is more than obvious that that someone must be the Governor-General, and he alone. . . . The contention (of the petitioner) is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it. . . . It was next said that the Ordinance did not condone to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by section 72 is an absolute power'.

The final ground on which the defence based its plea to the jurisdiction was that the charge of waging war was a civil offence under the Indian Penal Code and so within the requirements of section 196 of the Criminal Procedure Code.[77] This section, as amended,[78] provides that 'no court shall take cognisance of any offence punishable under Chapter VI (in which section 121 appears) of the Indian Penal Code . . . unless upon complaint made by order of, or under authority, from the Provincial Government or some officer empowered by the Provincial Government'. The Judge Advocate advised the court that 'the procedure of a court-martial is regulated entirely by the Rules made under the I.A.A., and these Rules contain no provisions equivalent to section 196 of the Criminal Procedure Code. This Code does not apply to courts-martial except in so far as certain sections of it have been specifically made applicable by the I.A.A., or any other Act of the Indian Legislature. A court-martial, unlike an ordinary criminal court, does not proceed upon the

[75] *Transcript*, *l.c.*, December 17, 1945.
[76] (1931), 58 L.R.Ind.App. 169 at 172.
[77] Act V of 1898.
[78] Amendment to M.I.M.L. No. 51 of September, 1937.

complaint of anyone, nor does it, in my opinion, "take cognisance" of any offences. A court-martial is constituted by the convening order, and continues only so long as the particular matters referred to it are undecided. It has no power to direct that any person shall be tried before itself. Moreover when a court-martial and an ordinary criminal court both have concurrent jurisdiction to try an offence, section 69 of the I.A.A. gives discretion to the military authorities to determine by which court the offender will be tried, and there is no restriction in this section requiring the military authorities to obtain prior sanction from anyone. In my opinion, therefore, section 196 of the Criminal Procedure Code is irrelevant in the present trial, as are the submissions of the learned counsel for the defence based on this section'.[79] In view of this advice the court decided that on this ground, too, the plea to the jurisdiction could not be allowed.

After the court had rejected the plea to the jurisdiction the case proceeded, but on December 27, 1945, defence counsel informed the court that the Delhi sub-judge had issued an *ex parte* injunction against the members of the court and the convening authority, pending a hearing of the application that the court was without jurisdiction. The prosecution alleged that the order of the civil court was null and void on the grounds, among others, that: 'An injunction cannot be granted to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings';[80] and counsel pointed out that by I.P.C., s. 193, 'A trial before a court-martial is a judicial proceeding', and there was no possibility of there being a multiplicity of proceedings. He further asserted that the court was concerned with a criminal matter, and 'an injunction cannot be granted to stay proceedings in any criminal matter'.[81] The Judge Advocate refused to advise in this way, but recommended an adjournment 'solely out of courtesy to the learned judge who, in making the order which he did, was acting after all in a judicial capacity'.[82] The final order of the sub-judge[83] dismissed the application for a permanent injunction on the technical grounds that 60 days' notice as required by the Civil Procedure Code,

[79] *Transcript*, *l.c.*, December 17, 1945.
[80] Specific Relief Act (I of 1877), s. 56 (*a*).
[81] S. 56 (*e*).
[82] *Transcript*, *l.c.*, December 27, 1945.
[83] Order of Sardar Ata Ullah, Subordinate Judge, 1st Class, Delhi, dated January 7, 1945.

section 80,[84] had not been given to the military personnel concerned, and that the consent of the Governor-General to institute the proceedings had not been obtained as required by the Government of India Act, s. 270 (1).[85] An appeal to Lahore High Court was dismissed on the same grounds and the substantive elements of the plea to the jurisdiction were not touched upon in any way.

The witnesses for the prosecution testified to conditions in the concentration camp and described the beatings they had themselves suffered at the hands of the accused, or at their instigation, to recruit them for the I.N.A. The defence was concerned in disparaging the witnesses by suggesting, in cross-examination, that they had themselves been in the I.N.A. or had been sent to the ' detention camp ' for disciplinary reasons, where they had been made to do fatigues and were now embroidering realities in order to appear as heroes. The evidence of the murders was given by men of the 22nd Mountain Regiment who had been present at Kranji Camp when the accused arrived in charge of an armed guard which opened fire, on their orders, after the Muslims of the unit had refused to join the I.N.A. and declined to surrender their N.C.O.s for removal to the concentration camp. Among those who gave this evidence were the medical officer at Kranji, a member of the regiment who had lost his arm as a result of the injuries he received, persons who had identified the corpses, and one who had been a member of the burial party. The defence here was that the accused had gone to Kranji in accordance with lawful orders received from I.N.A. Headquarters, were vastly outnumbered and acted in self-defence. Unfortunately, however, a number of Gurkhas testified to a similar incident implicating the accused when the Gurkhas were fired upon at another camp for similar reasons. Defence witnesses were called to show that the accused had acted on orders, that the ' detention camp ' was for disciplinary purposes, prosecution witnesses were members of the I.N.A. and no coercion was used to enrol volunteers. The accused were found guilty of murder and causing grievous hurt, and the sentence, as announced by the

[84] (Act V of 1908): ' No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiry of two months next after notice in writing has been delivered to . . . such public officer stating the cause of action '.

[85] (25 & 26 Geo. 5, c. 42): ' No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India . . . except by the consent of the Governor-General . . .'.

confirming authority, committed them to imprisonment for fourteen years.

Shortly after this case only violence charges were presented, and very few further trials took place.

It is submitted that many men joined the I.N.A. for comfort or for ambition, but it cannot be denied that many among their number were motivated by high ideals of patriotism. Many no doubt felt what Shingara Singh said: 'I joined the I.N.A. deliberately and after deep thinking for the object of attaining the freedom of India. I did what I considered best and my actions were motivated by the one holy desire to set India free. I have no recriminations nor any regrets. My only crime is patriotism. I am told that I betrayed the oath of allegiance to the King. I am not guilty and I do not feel guilty because I took the oath of allegiance to the Provisional Government of Free India on October 21, 1943, in Malaya—an oath to serve my country'.[86]

The effects of the I.N.A. trials, political and otherwise, and of the hero-worship resulting therefrom, are still being felt in India, and are likely to continue to be felt for many years to come. Thus Sardar Baldev Singh, Defence Member in the Interim Government, has recently spoken of the need to strengthen the morale of the Indian services 'which in recent months has been somewhat tried by internal indiscipline and perverse lauding of the "Indian National Army" and its role in the war against the Allies in Asia'.[87] Nevertheless, Congress has recently seen fit to raise volunteer bodies under the command of Shah Nawaz,[88] who was one of the accused in the first case discussed here; and no member of the Interim Government attended the investiture at which a loyal officer received the George Cross for withstanding torture by the I.N.A., 'possibly . . . because of protests by members of the "Indian National Army" against the award to Captain Duranni, who they accuse of "disloyalty" to that body'.[89] In view of the political furore aroused by these trials and the manner in which the ultimate sentences were reduced out of all proportion to the gravity of the offences, it would probably have been better had a general amnesty been issued and none

[86] Statement of accused. *Transcript*, *l.c.*, February 4, 1946.
[87] *Times*, October 10, 1946.
[88] *Sunday Times*, March 9, 1947.
[89] *Times*, March 12, 1947. See *Times*, April 6, 1947, on differences between Interim Government and C. in C. concerning review of sentences. Also *Times*, August 27, 1947, where it is reported that the recent riots in the Punjab were instigated by Sikh ex-members of the I.N.A.

of the trials staged. If, on the other hand, it was necessary, if only from the point of view of the loyal army, to hold such trials, the only persons to have been tried should have been those charged with cruelty and atrocities against Indian troops. If this had been the policy pursued it would have been difficult, if not impossible, for the Indian political parties to have represented these trials as political, with the accused appearing as outstanding patriots.

In his opening address, counsel for the prosecutor in the *Shingara Singh Case* pointed out that ' the offences . . . are of such a nature that if the accused were not British subjects, but if they were, for instance, Germans or Japanese, they could and would be tried as common war criminals for offences against the laws of war and humanity '.[90] It is submitted that in all three cases the political charge of waging war ought never to have been brought, and that the accused, regardless of their British nationality—for the German Supreme Court tried German war criminals after the first World War [91]—should have been proceeded against as common war criminals for their atrocities against Indian prisoners of war.

L. C. GREEN.

[90] *Transcript*, *l.c.*, December 18, 1945.
[91] See *International Law and Totalitarian Lawlessness*, by G. Schwarzenberger, London, 1943. Appendix 2, the Leipzig Trials, pp. 113–147.

CORRESPONDENCE

THE OPERATION OF NULLITY DECREES

1 Dr. Johnson's Buildings,
Temple, E.C.4.
November 22, 1947.

The Editor,
Modern Law Review.

Dear Sir,

Mr. F. H. Newark by his article in your issue of November 1945 (which I have only just seen) has done a great deal to dispel the widely held illusion that in English law there is any justification for using the word 'voidable' in reference to marriage ceremonies which are void for whatever reason. Probably the illusion has become far too deeply entrenched to dispel altogether. One finds 'voidable' used, for instance, by no less a jurist than Dr. Cheshire in his *Private International Law* in reference to ceremonies which the courts have held that there was no marriage at all because of impotence, wilful refusal, insanity and other causes.

In the *Law Quarterly Review,* October 1947, Mr. J. F. Garner cites with approval the distinction made by the late Bateson, J., between 'void' and 'voidable' marriages in *Inverclyde,* [1931] P. 29, although both that decision and its *ratio decidendi* have ceased for a long time to be followed in the Divorce Court, and in fact it received its quietus in *Hutter,* [1944] P. 95. I am not unmindful of the fact that in *De Reneville,* a recent nullity suit, Jones, J., based his decision as to domicile on the distinction between 'void' and 'voidable'. An appeal is pending in this case. In *Adams,* [1941] 1 K.B. 536, Scott, L.J., approached the point very cautiously when he said: 'The use of both terms in connection with the status of marriage has received judicial sanction, and is consonant with the ordinary English meaning of the words, although it lends itself to misuse, and may cause confusion'. The point in that case was that if during the continuance of a putative marriage the male spouse covenants by way of a deed of separation to make provision for the female spouse, and the marriage is thereafter annulled on the ground of the female's incapacity, then the deed is binding notwithstanding that there was no marriage. The Court of Appeal approved the decision to the same effect of Farwell, J., on the same point in *Fowke,* [1938] Ch. 774, in which I had urged the contrary. Really the decisions in *Adams* and *Fowke* were of the same kind as in *Dodworth* v. *Dale,* [1936] 2 K.B. 503 (concerning the incidence of tax where a marriage is annulled). Mr. Newark quite rightly says (at p. 206) that 'such cases prove nothing' in regard to the non-existence of a marriage once it has been declared void. In *Newbould* v. *Att.-Gen.,* [1931] P. 75, Lord Merrivale emphasised the retrospective effect of a decree of nullity of marriage for incapacity in rendering valid a later marriage by the male partner with another woman before the earlier marriage was annulled. This important decision was cited by Sir Valentine Holmes in *Adams* but not mentioned by any of the three Lords Justices in their judgments. *Newbould* was also cited with approval by Andrews, L.C.J., in *Mason* v. *Mason and Pennington,* [1944] N.I.L.R. 134 (cited by Mr. Newark at p. 217 in another connection). This was a case in which a decree nisi of nullity was made in July 1934, the male spouse married another woman on January 10, 1935, and the decree of nullity was made absolute on January 21, 1935. Thus it was

declared that the former so-called marriage was not one, and the other marriage in January 1935 was therefore valid.

It is quite true that in the Matrimonial Causes Act, 1937, section 7 (1) introduces the words 'void or voidable', but statutes often fail in exactitude. Thus in section 2 (*b*) of the same Act we find the expression 'has deserted the petitioner *without cause*'. The italicised words are obviously pleonastic and would only be appropriate if instead of the word 'deserted' the statute used the word 'left' or 'abandoned'.

Turning to other points in Mr. Newark's instructive article I would venture to make the following comments:

(1) In a case of nullity the plea of 'insincerity' is scarcely ever used except where there has been long delay in alleging incapacity, and in effect it only means this: 'You have been living in an apparent married state so long that there is an extra special burden on you of proving incapacity' (see *T.* v. *T., orse. J.* (1931), 47 T.L.R. 629).

(2) As for the principle of *Tamquam soror* it may still be effective, as when a young man marries a very much older woman quite plainly to enjoy the benefits of her fortune and influence. Here we get the doctrine of approbation (see *G.* v. *M.* (1885), 10 App.Cas. 171), which, however, is very rarely applied.

(3) Mr. Newark states no authority for his proposition (at p. 213) that 'where a man has married a woman knowing of her incapacity' he cannot obtain a decree of nullity. *Jeffcoat* (1947), 63 T.L.R. 435, is a decision to the contrary.

(4) As to a petition for nullity on the ground of the petitioner's own impotence and the repudiation of the marriage by the respondent (p. 214 of the article), see *Davies, orse. Mason,* [1935] P. 58, and *M.* v. *M.* (1908), 25 T.L.R. 328.

(5) At p. 215 Mr. Newark suggests that 'a party to such voidable marriage who marries again without decree obtained does not commit the felony of bigamy'. Thus if a man is wilfully refused intercourse or he determines that his wife cannot give him complete intercourse he might be tempted to arrogate to himself the right of being a judge in his own cause in a disputable matter, say there was no marriage and legally marry again. Surely no practising lawyer would sanction such a step; he would advise obtaining the judgment of the civil court as to nullity.

Finally I observe a thoughtful article in the *Law Times* of November 1, 1947, which to my mind finally disposes of the confusing use of the word 'voidable' in this context.

Yours faithfully,

WILLIAM LATEY.

STATUTES

TOWN AND COUNTRY PLANNING ACT, 1947

THE Town and Country Planning Act, 1947, has been called a skeleton Act; but it is a singularly robust-looking skeleton. Its 120 ample sections and eleven formidable schedules dwarf the more modest New Towns Act, its companion in the new planning code. Nevertheless, so extensive are the powers of delegated legislation conferred by the Act that it may be some years before its full implications become clear.

Before the war only a small proportion of local authorities had planning schemes in actual operation. Whilst this was due partly to the phenomenal prolixity of the procedure necessary for putting any local scheme into operation under the 1932 Act, there were also more serious obstacles. The bogey of compensation frightened many authorities into adopting a timid approach towards planning. They also tended to think in parochial terms; in the words of the Explanatory Memorandum [1] to the 1947 Bill, 'the tendency was for each authority to plan their area in isolation from their neighbours'. Nor were they obliged to prepare any scheme whatever; and if they did take positive action, their powers were insufficient to ensure satisfactory development, as distinct from preventing bad development. Further, the system was fundamentally rigid; once a planning scheme obtained the force of law, the procedure for amendment was too complicated.

In recent years the idea that physical planning should be conceived as a national, rather than a local, responsibility, has gained ground. The establishment of a Ministry of Town and Country Planning in 1943 was followed in the same year and in 1944 by statutes which brought this goal nearer to fulfilment. But the main weaknesses persisted. The 1947 Act seeks to cure them by solving the financial problems of local authorities and at the same time erecting a new structure of planning machinery to ensure that planning will be centrally co-ordinated and also effectively executed. It owes much to the Uthwatt Committee's Report, although most of the Committee's recommendations have been substantially modified.

The essentials of the new scheme introduced by the Act are: The present system of interim development control is to be modified and extended to all stages of planning, so that no development of land may in future take place without permission; no compensation will normally be paid for refusal of permission; where

[1] Cmd. 7004/1947, p. 4.

permission is given, a development charge must be paid by the developer to the State. The potential 'development value' of land is thus extinguished, and land will therefore change hands at a price roughly corresponding to its 'existing use value'. (Increase in land value which accrues without development is left with the owner, however).[2] To compensate the owners of interests in land which are consequently depreciated in value, payments will be made out of the Exchequer. This will remove the heaviest burden of compensation from the shoulders of local authorities. If the Act also ends speculation in land values, it may perhaps prove the most significant measure passed by the present Government.

General compensation provisions. The present development values of land are to be assessed, and compensation for their extinguishment will be paid out of a global sum of £300 millions to owners of fee simple and leasehold interests. The principles governing the distribution of this amount will be prescribed in a scheme to be made by the Treasury; the scheme must be approved by affirmative resolutions of both Houses. Additional payments may be made in respect of certain war-damaged land. All claims for payments must be submitted to the Central Land Board, a body corporate which will consist of a chairman and not more than nine other members [2a] to be appointed by the Minister and the Secretary of State for Scotland. Payments will be in the form of negotiable Government stock or cash.

Local authorities will henceforth be able to purchase compulsorily land they require for planning purposes at its existing use value, but the date with reference to which the existing use value will be assessed will (subject to interim provisions having effect only until the 'appointed day') be the date of the notice to treat. The 1939 standard of compensation, recommended by the Uthwatt Report and adopted in the 1944 Act, is therefore abandoned.

To complete the new financial arrangements, Part X of the Act provides for a comprehensive system of Exchequer grants to local authorities to meet the expenses of compulsory acquisition and of those special cases where other compensation is payable to private owners. Maximum grants of 90 per cent. and 80 per cent. may be made in respect of their most important disbursements, conditional upon Ministerial and Treasury approval of the development proposals. Provision is also made for defraying the cost of compensation already paid under earlier Planning Acts.

[2] Cf. Final Report of the Uthwatt Committee, which recommended a quinquennial levy of betterment charges on site values: Cmd. 6386/1942, §§ 308–347.

[2a] On Nov. 11, 1947, the Minister announced the names of the chairman and six members of the Central Land Board: see 444 H.C. 168–70. S.R. & O., No. 2294 of 1947, deals with the terms of appointment of members of the Board, and with some administrative matters. They are to hold office for such term and subject to such conditions as the Ministers shall determine, and they are disqualified from sitting in the House of Commons.

Local planning authorities. The principle is now accepted that planning requires to be carried out by large authorities with adequate resources. Accordingly, the new local planning authorities (l.p.a.'s) are to be the councils of the county boroughs and the counties. The L.C.C. becomes the l.p.a. for the whole of London, though the City of London retains a number of its existing powers within its own boundaries (s. 114). In 1932 there were 1441 planning authorities; now there will be 145. Joint planning committees for areas smaller than counties are abolished altogether.

The county districts are excluded from direct responsibility for the preparation of the development plan (*v. infra*), but section 10 provides that they must be consulted before the l.p.a. presents the plan for the Minister's approval. Schedule I introduces a further opportunity for their participation: any function of an l.p.a., except the power to raise money, may be exercised by the planning committee of the l.p.a. or a sub-committee of that committee; and a majority of any such sub-committee 'shall be members either of the local planning authority or of the councils of county districts comprised in the area of that authority'. Moreover, by section 34 the Minister is empowered to make regulations (after consultation with representatives of local authorities) authorising l.p.a.'s to delegate to county district councils any of their functions in connection with the granting of development permissions or the enforcement of planning control. (See now S. R. & O. 2499 of 1947.)

Section 4 empowers the Minister to constitute two or more (or parts of two or more) l.p.a.'s as a united district with a joint board as the l.p.a. In addition, joint advisory committees may be established to advise two or more l.p.a.'s in their functions. A final complication is introduced by the Minister's power to vest certain land acquired by a local authority in a joint board on which it must be represented.

Development plans. Within three years of the appointed day (which day is expected to be early in 1948) each l.p.a. must prepare a comprehensive development plan for its area and submit it for the Minister's approval. The plan may designate, as being subject to compulsory acquisition by the appropriate authority within a period of ten years (in the case of agricultural land, seven years), virtually any land required for the implementation of its multifarious purposes. It is to be noted that the plan may thus designate not only land comprised in an 'area of comprehensive development' (see section 5 (3)) and land contiguous or adjacent thereto, but also *any other* land which, in the opinion of the l.p.a., ought to be acquired for the purpose of securing its use in the manner proposed by the plan. If land designated as subject to compulsory purchase has not been acquired within 12 years, the owner may require the l.p.a. to do so. Flexibility is ensured by section 6, which provides that a fresh survey of the area subject to the plan shall be made every 5 years, and that proposals for the amendment of the plan

may at any time be submitted by the l.p.a. for the Minister's approval. The Minister is given powers to secure the preparation of a proper plan where the l.p.a. fails to perform its duties satisfactorily.

Part IV of the Act confers upon the existing local authorities increased powers of compulsory acquisition, disposal and positive development commensurate with the broad conception of a development plan. In general the provisions of the 1944 Act are incorporated, with the requisite modifications. Of particular interest is the repeal of section 20 (3) of the 1944 Act (which provided that in certain cases the Minister should not give his consent to l.p.a.'s to carry out development which private persons were willing and able to undertake) by section 44 (2) of the 1947 Act.

Development permissions. The sections dealing with the topic of development permissions are of the first importance. The meaning of development is defined in section 12, a section which will require careful scrutiny by all practising lawyers. Permission may be granted by development orders to be made by the Minister, and by the l.p.a. in cases not covered by such orders. The l.p.a. may grant permission for a limited period only, and it may impose such other conditions as it thinks fit, including conditions regulating the use or development of *any* of the applicant's land where it considers this to be expedient for the purposes of the development actually authorised. A development order may direct that particular cases shall be referred to the Minister directly. Also, applicants aggrieved by the l.p.a.'s decision may appeal to him. In either case his decision is final.

Section 17 introduces an innovation : applications may be made to the l.p.a. to determine whether a proposed use of land constitutes development within the meaning of the Act and, if so, whether permission is required. An appeal lies from the l.p.a. to the Minister and thence to a court of summary jurisdiction—a somewhat surprising choice of tribunal.[3]

If, as the result of the Minister's or l.p.a.'s decision regarding an application for development permission, the land is rendered incapable of reasonably beneficial use, the owner may, in certain cases, serve notice on a local authority requiring it to purchase his interest. Apart from this exception, and other cases specified in section 20 and Schedule III, the dissatisfied applicant is not entitled to compensation, though he may be so entitled where a permission already granted is subsequently modified or revoked.

Further, where permission is granted, no development may be carried out until a development charge (if any be imposed) has been paid to the Central Land Board. Section 70 (2) provides that in determining whether any, and if so what, development charge shall

[3] Cf. Potter, ' The New Land Law under the Town and Country Planning Bill ', 11 *Conveyancer* 147 at p. 151.

be levied, the Board shall have regard to the increment in value accruing to the land by virtue of the grant of permission and ' shall not give any undue or unreasonable preference to one applicant over another '. (*Quære*, whether this is anything more than moral exhortion or whether the courts will in practice find it possible to quash the Board's decisions for non-compliance with this requirement.) Other general principles to be observed by the Board will be prescribed in regulations to be made by the Treasury. These regulations, which will require approval by affirmative resolution, may provide for the adoption of different standards in respect of development of different classes and development carried out at different periods. It appears to be generally expected that the aggregate sum of development charges collected will in due course exceed £300 millions paid out by the Board as compensation to landowners.

Land ripe for development before the appointed day (see section 80) is exempted from the payment of a development charge. Land held by Government departments, operational land of statutory undertakers, land held by local authorities for general statutory purposes and land held on charitable trusts and inalienable land of the National Trust, are all free from development charges and receive no share of the £300 millions. (A Government department may, however, enter into a special agreement with the l.p.a.) Similar rules apply to land acquired by local authorities for comprehensive development or re-development, and by development corporations under the New Towns Act, but these authorities may be required to pay to the Central Land Board sums in lieu of development charges.

Limitations on the Minister's powers. Some criticism has been aroused by the fact that the ultimate control over development does not invariably rest with the Minister of Town and Country Planning. Thus, section 34 gives the effect of development permissions to the exercise of the existing powers of other Government departments to authorise development by local authorities and statutory undertakers; by section 14 (4) a certificate must be obtained from the Board of Trade before permission for the erection of certain industrial buildings can be given; and, most important of all, section 88 provides that the question of conformity with the development plan in the case of land held by Government departments shall be determined by agreements made between the l.p.a. and the department concerned, subject to Treasury approval. Moreover, the responsibility for authorising compulsory purchases is shared by the Minister with some of his colleagues. Where land is designated by the plan as being subject to compulsory purchase by a Minister, that Minister has sole control; where it is to be acquired by a local authority or statutory undertaker, the Minister concerned with the functions in question is the appropriate authority; the Minister of

Works and the Postmaster-General have special powers in the period before a development plan becomes operative.

Planning control. The provisions dealing with the enforcement of planning control embody most of the existing law on the subject and also increase the powers of the l.p.a. in some respects. Orders may be made for the cessation of development carried out without permission or contrary to the conditions of the grant (there is a right of appeal to Petty Sessions), and for the preservation of trees and woodlands and buildings of special architectural and historical interest. The l.p.a. is also given wide powers to order the discontinuance of existing uses, or the demolition or alteration of any building, on planning grounds; the Minister must hold an inquiry before confirming such an order, if the property-owner so desires. The Minister is given default powers in respect of all these orders. In all the cases mentioned, except the first, compensation may be payable to the owner affected by the order.

Section 31 enables regulations of a far-reaching character to be made for the control of advertisements in the interests of amenity and public safety. Applications for permission to exhibit advertisements will be made to the l.p.a., and the regulations may provide for an appeal either to the Minister or to an independent tribunal. The Minister has stated [4] that he hopes to appoint twelve regional tribunals with independent legal chairmen.

General. The practising lawyer's main preoccupation with the Act will centre, first, around its provisions concerning compensation and, secondly, around its general effect upon the law of property. In this brief outline no mention has been made of many of the most important provisions dealing with these matters. The former, however, cannot be discussed otherwise than in minute detail, and the latter merits a separate and searching analysis. Reference to such important subjects as methods of assessing compensation, existing contraventions of planning control,[5] restrictive covenants entered into between l.p.a.'s and landowners (section 25), the keeping of registers, land charges, powers of entry, mineral workings, ribbon development, trunk roads and other highways, has therefore been totally omitted. But there are several points of particular interest to the public lawyer:—

(a) *The Central Land Board.*

The Board is obliged to comply with such directions of a general character ' as the Minister may give it ' (section 3 (1)); the functions of the Secretary of State are limited to a share in its appointment. It must also make an annual report to be laid before Parliament, and this ' shall set out any direction given by the Minister to the Board during that year unless the Minister has notified to the

[4] *H.C. Deb. Stdg. Ctee.* ' *D* ' (1947), col. 438.
[5] See R. C. Doble, ' Town Planning Contraventions ', 11 *Conveyancer* 190.

Board his opinion that it is against the interests of national security so to do' (section 3 (2)). Should any such secret directions be contrary to law, it would seem that no means exist of challenging them.

The main functions of the Board consist in fixing development charges and distributing compensation to landowners out of the £300 millions. The uncertainty regarding the principles to be observed by the Board in fixing charges has been referred to *supra*. During the parliamentary debates, the Minister maintained that the functions of the Board in this matter were analogous to those of a landlord deciding a reasonable rent, and he successfully resisted proposals that applicants should have a right of appeal to the courts or to an independent tribunal. On the other hand, he accepted the contention that both applicants for compensation [6] and would-be developers [7] should enjoy the right of professional assistance when presenting their cases to the Board.

Among the other powers of the Board, the most important is that conferred by section 43. The Board may itself acquire land, by agreement or compulsorily, for disposal in accordance with the Minister's directions and at a price inclusive of the development charge. But the purpose of this section is not 'to introduce nationalisation by the back-door'. The Board must not develop land so acquired, and the Minister has given the assurance [8] that section 43 will only be invoked to stimulate development in areas where this object cannot be achieved by other means.

Perhaps the most curious subsection in the Act is section 3 (3), which provides that the functions of the Board and of its officers and servants shall be exercised on behalf of the Crown. One of its purposes is to confer upon the servants of the Board the privilege of becoming civil servants [9]; but no other recent statute establishing a public corporation includes such a provision. Certainly it enables the Board to enjoy the benefit of such legal immunities as the Crown retains since the Crown Proceedings Act. Presumably mandamus will not issue against the Board. What of contracts made by the Board? Here the Board is probably in the same position as other public authorities, but some doubts are raised because of the rule attributed to the *Amphitrite Case*,[10] that the Crown cannot by contract fetter its future executive action. It is very hard to believe, however, that any court would apply such a principle to everyday contracts made by a body like the Central Land Board. One clear consequence of section 3 (3) is especially unfortunate. In recent legislation the tendency has been to extend the period of limitation of actions against public boards from twelve

[6] 437 H.C. Deb. 1132.
[7] 441 H.C. Deb. 866.
[8] S.C. 'D' (1947), cols. 549–50.
[9] S.C. 'D' (1947), col. 99.
[10] *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500.

months to three years; but as a result of this strange anomaly the twelve-months period will apply to proceedings against the Central Land Board (see Crown Proceedings Act, 1947, s. 30 (2)).

(b) *Parliamentary control.*

By means of the scrutiny of regulations made under the Act, the debate on the annual report of the Board (subject to the omission of secret directions), the debate on the estimates (the Board is to be given a separate vote), the work of the parliamentary financial committees and the other usual opportunities for raising questions of general political interest, Parliament will be able to exercise a certain measure of control over the activities of the Board. The present Minister's views on the proper limits of such control are indicated by his statement [11]: 'It is not my intention to be answerable in Parliament for individual cases determined by the Central Land Board'.

(c) *Semi-judicial functions of the Minister.*

Various types of compulsory purchase orders and orders for the enforcement of planning control require confirmation by the Minister. Again, in some cases disputes may be referred to him by way of appeal or directly for his decision, and he may be required to give the parties the opportunity of being heard before a person appointed by him. Whenever he gives his decision in such a dispute, or confirms an order made by a local authority to which objections have been lodged, his functions are sufficiently 'judicial' for the courts to invalidate the exercise of his discretion if he has failed to comply with the rules of natural justice. The semi-judicial aspects of such functions are emphasised when a public local inquiry is held before the final decision is reached. Section 104 empowers the Minister to hold a local inquiry for the purpose of any of his functions under the Act. Special provision is made for the holding of such inquiries prior to the constitution of joint planning boards and to the exercise of certain default powers. But by far the most important provision is contained in section 10 (3), which says that after the Minister has heard objections to, or conducted a local inquiry in connection with, a development plan, he may then consult the l.p.a. or any other person or authority before coming to his decision, without being obliged either to consult any other person concerned or to give any further opportunity for representations to be made. This is a clear departure from the *audi alteram partem* rule which has hitherto been applied in the construction of other statutes where provision is made for local inquiries.[12] It recognises the need for elasticity in the formulation of comprehensive planning schemes; and it represents the point of view now gaining increased support from the judicial bench, that such functions of Ministers

[11] S.C. 'D' (1947), col. 707.
[12] See, *e.g.*, *Errington* v. *Minister of Health*, [1935] 1 K.B. 249.

are in the nature of administrative and political acts, and are not to be compared too closely with those of a judge who has to decide a dispute between two parties.

(d) *Functions of the superior courts.*

Specific provision is made for reference to the High Court of questions of law arising out of section 85 (which deals with charitable trusts), and for appeals against penalties imposed by the Central Land Board in respect of development carried out without the payment of a development charge. Undoubtedly, also, property-owners will try to persuade the courts to quash orders made under the Act, by invoking their usual powers of control over public authorities. The courts have, in the past, taken action to prevent excess of powers and *détournements de pouvoir*; the latter idea is here used to include infringements of the rules of natural justice, decisions arrived at through the operation of faulty motives and decisions which are 'unreasonable'. Although invalidation of discretions for excess of powers is possible under this Act, so wide are the most important discretionary powers (those relating to the preparation of development plans and the making of compulsory purchases) that this method of control is not likely to be of great effect. The same observation can be applied to the question of faulty motives and unreasonableness. The framers of the Act appear to have deliberately discouraged judicial interference by the almost invariable use of phrases such as 'the Minister may make such order as he considers expedient' (or 'reasonable', or 'necessary', or 'appropriate') when he is satisfied that certain facts exist. (The word 'expedient' occurs more than forty times.) This phraseology is clearly calculated to deter the courts from requiring the authority to conform to some objective standard when exercising its discretion. In the past, Parliament has often used alternative expressions—*e.g.*, that the Minister may, when certain facts exist (or when satisfied they exist), take such action as is requisite—sometimes in order to indicate that an extrinsic test is to be applied, but very often merely in order 'to improve the graces of the style and to avoid using the same words over and over again'.[13] The wording of this statute leaves little room for such misinterpretation. And the decisions of the House of Lords and the Court of Appeal in the recent *Stevenage*[14] and *Plymouth*[15] *Cases* suggest that the courts are now far from eager to interfere with the functions of a Minister responsible to Parliament.

Of late the courts have shown a very lukewarm enthusiasm for the concept of natural justice, but it will still provide opportunities for the review of administrative discretions which are preceded by a

[13] *Per* Blackburn, J., in *Hadley* v. *Perks* (1866), L.R. 1 Q.B. 444 at p. 457; cf. Wade, 'The Content of Legislation', 18 *Political Quarterly* 350 at p. 357, for a similar view of recent enactments.

[14] *Franklin* v. *Minister of Town and Country Planning* [1947] 2 All E.R. 289.

[15] *Robinson* v. *Minister of Town and Country Planning*, [1947] K.B. 702.

'judicial' deliberation. What of the functions of the Central Land Board? The courts may well decide that when fixing development charges its capacity is sufficiently 'judicial' for certiorari to issue in respect of its determinations.

Conclusion. Three salient features of recent legislation are present in the Act.

(1) Parliamentary control over important spheres of administrative action is, for practical purposes, eliminated. Yet the importance of such control is enhanced by the diminution of judicial control over matters of administrative policy. There seems little prospect of any change in this situation without some readjustment of the machinery of government.

(2) The Act marks a further decline in the status of the smaller local authorities—a trend already clearly manifested in the recent Education and Police Acts. In this Act, however, they are compensated by an increase in the scope of a number of their functions.

(3) The decision of the various disputed questions of law and fact is allocated to Ministry officials, the Central Land Board, local planning authorities, independent tribunals, courts of summary jurisdiction, county courts and the High Court. Whilst no one would suggest that all such issues are appropriate for determination by one type of body, the question will undoubtedly arise whether many of them might not be dealt with satisfactorily by a coherent system of administrative tribunals which could establish a uniform standard of adjudication.

S. A. DE SMITH.

COMPANIES ACT, 1947

IT is difficult to write a comprehensive and succinct review of a statute which is intended to be a series of amendments of the existing law. Each section or group of sections deals with a separate aspect of company law and is thus a self-contained unit. Even the definition section which constitutes the link connecting the various parts of a statute of this type has only been assigned a humble rôle in the enactment under review. It is true that a common policy underlies most of the reforms inaugurated by the Act, but that policy, formulated long ago in the Report of the Cohen Committee, has already been discussed in these pages (see an article in Vol. 9, p. 235). Besides, while it was the avowed intention of Parliament to give effect to the principal recommendations of the Cohen Committee, the moment when the statute received the Royal Assent signified the legal irrelevance of the policy which inspired it. The Act has now passed into the care of the legal profession whose concern is technique not policy. This review will therefore deal with some technical points and, incidentally, indicate some of those provisions which are at variance with the recommendations of the Cohen Report.

It will be remembered that the Cohen Committee had recommended the abolition of the ultra vires principle as applied to companies registered under the Act. Presumably owing to the technical drafting difficulties involved in this reform, the Government Bill as originally laid before the House of Lords failed to give any effect to this proposition. In the Lords a clause was added to the Bill which, while keeping the principle alive, deprived it so to speak of its teeth. This clause, with some minor amendments introduced by the House of Commons, appears now as section 76 of the Act. It provides that the objects clause of the memorandum will be subject to alterations by special resolution without the confirmation of the court. Such alterations will continue to be permissible only for the purposes enumerated in section 5 (1) of the Companies Act, 1929. But, apart from the fact that, as experience has shown, these purposes are formulated in so flexible a way as to cover practically everything, there is a new and very useful provision (section 76 (10), added in the Commons), by which 'the validity of the alteration shall not be questioned on the ground that it was not authorised by subsection (1) of section 5 of the principal Act, except in proceedings taken for the purpose . . . before the expiration of twenty-one days after the date of the resolution'. This makes it impossible to allege, after the expiration of the statutory period, that the company has acted ultra vires on the ground that the alteration of its objects clause was not covered by one of the 'purposes' enumerated in section 5. Will the new provision also apply to a case in which the company had purported to effectuate the alteration by an ordinary resolution or in which what was meant to be a special resolution suffered from some formal defect? The wording of the subsection suggests it and it is certainly in the spirit of the statute, but a less ambiguous wording would have been desirable. A qualified minority of share- or debenture-holders can, within twenty-one days, apply to the court to have the alteration cancelled and in the proceedings set in motion by such application the court exercises a discretion similar to the one wielded hitherto in the proceedings on a petition for confirmation. The net result is this: ultra vires will continue to haunt the textbooks, the lecture-rooms and the examination papers, because anything done outside the objects clause will continue to be subject to the principle in all its rigour. But an alteration of the objects clause will be so easy and an attack on its validity so difficult that a lawyer may confidently expect that ultra vires will never cross his path again once he has passed his Final Examinations.

The changed status of the objects clause signifies a growing approximation between the legal effect of the memorandum and that of the articles. This is further emphasised by a new provision, not suggested by the Cohen Committee and added in the

Commons. Hitherto any part of the company's constitution which was written into the memorandum was unalterable unless it came within the purview of one of those sections of the Act which expressly permitted alterations. Thus if anything concerning directorships, meetings, resolutions, etc., which might have been embodied in the articles, had found its way into the memorandum it was unchangeable. The criterion of immunity from change was purely formal. What mattered was the document in which a given part of the company's constitution happened to appear. Section 77 of the new Act replaces this formal by a substantive test. The non-compulsory part of the memorandum is, for the purposes of amendment, to be treated as part of the Articles and can thus be altered by special resolution. This applies to existing companies and memoranda. It is, however, subject to a number of exceptions. Thus special rights of any class of members embodied in the memorandum cannot be altered, a necessary concomitant of the rule laid down by the courts ever since *Andrews* v. *Gas Meter Co.* In other cases of attempted alterations of the 'voluntary' part of the memorandum minorities have rights of applying to the court similar to those exercisable where the objects clause is in dispute. The company, moreover, can do what the sovereign Parliament is incapable of doing : It can prohibit the alteration of any part of its constitution voluntarily written into the memorandum.

The complicated measures recommended by the Cohen Committee for the solution of the nominee problem were embodied in the Bill originally laid before the House of Lords, but were abandoned by the Government in view of their complexity and of their problematical value in practice. Neither the register of share ownership nor the duty to declare beneficial interests have thus found their way into the Act. Few will regret this, all the less so because, following another recommendation of the Cohen Report, the Act vests in the Board of Trade wide powers of investigating the ownership of companies (sections 46 to 49). These are linked with the greatly enlarged general powers of investigation (sections 42 to 45). Both Houses contributed to the strengthening of the machinery designed to disentangle the nominee question. The House of Lords introduced what now appears as section 47 of the Act : the power of the Board of Trade to investigate the ownership of given shares or debentures by requiring the persons concerned to give the relevant information to the Board directly and without resorting to the more cumbersome and expensive device of a formal investigation by an inspector under section 46. The House of Commons made it possible for a qualified minority of shareholders to apply to the Board for the appointment of an inspector and to obtain this appointment as a matter of right (section 46 (3)), so that in the case of investigations for the purpose of elucidating ownership as in the case of general investigations there

are now two types of procedure, the one ex officio (section 43 (1) (*b*) and section 46 (1)) and the one on application (section 135 of the 1929 Act as amended by section 42 of the Act of 1947 and section 46 (3) of that Act). The Board of Trade can impose restrictions on shares and debentures the ownership of which is being investigated if the persons concerned are unwilling to assist the investigation, with the result that the transfer of such rights, the payment of dividends or interest and the exercise of voting powers are stopped. If the powers vested in the Board are efficiently used, they should go far towards overcoming the nominee difficulty.

The provisions of the Act which are designed to protect minorities follow closely the recommendations of the Cohen Report. For the practising lawyer as well for what one may call the theory of company law perhaps the most interesting of these innovations is the one contained in section 9 of the Act. If the court is satisfied that the affairs of a company are conducted in a manner oppressive to some part of its members and that a winding-up order under the 'just and equitable' clause would be justified but that it would unfairly prejudice the minority, it may make an order regulating the future conduct of the company's affairs. It may also compel the majority to purchase the minority's shares or vice versa or order the purchase of shares by the company itself (coupled, in the latter case, with a capital reduction). The court may, by its order, exercise the constitution making power of the company and add to or amend its memorandum or articles. Such clauses in the company's constitution as have been inserted or altered by the court are immune from alteration by the company without the leave of the court.

The most widely publicised part of the Act and no doubt the one most prominent in business practice is the group of sections (12 to 25) and Schedules (I and II) which reform the law of accounts and audit. The lawyer will have to absorb the meaning of a number of new legal conceptions, such as 'group accounts' (not in this form contained in the Cohen Report) and 'consolidated accounts' and he will have to understand that the relation between the two is that of genus and species. He will note that the profit and loss account is now subject to minute legal regulation, but he will hardly be able to suppress a lingering doubt whether this regulation goes far enough to secure a necessary measure of publicity. Not only the student of company law but also the student of jurisprudence will have to study the new definition of a subsidiary company in section 18, and also that of a 'wholly owned subsidiary' which occurs several times in the Act (*e.g.*, section 14 (4) and section 26 (7) (*b*)). Indeed the analysis of the corporate entitled concept in English legislative and judicial practice which has been long overdue should find a great deal of interesting material in the Act.

The new regulation of payments to directors (which includes the prohibition of tax-free payments and of loans) and of the disclosure of payments to and interest of officers (sections 34 to 41) reproduces the Cohen Committee recommendations. In the article mentioned above the present writer attempted to summarise these recommendations and reference is made to what was said there. Questions of legal interest and difficulty touching the fundamentals of the law of quasi-contract and of constructive trusts may well arise from the new provisions dealing with loans to directors and payments for loss of office, but this is not the place to discuss them. Nor is it possible to do justice to the elaborate new rules governing the appointment of directors and secretaries which include the much canvassed provision about the age limit (sections 26 to 33).

A word must, however, be said about the treatment of private companies in the Act. This subject has been much contested in and out of Parliament and the all too complicated formulation of section 54 and of the Third Schedule seems to show the traces of these struggles. It has become a matter approaching in its complexity the more recondite branches of conveyancing to decide whether or not a private company is 'exempt', *i.e.*, whether it is relieved of the duty of filing its accounts with its annual return. The present writer feels that the problem how to explain this vital matter to his students is well-nigh insoluble. Nothing touches the businessman's daily life more intimately than this question. Was it necessary to surround it with complexities so formidable that the House of Commons, at the eleventh hour, found itself compelled to prohibit prosecutions for failure to comply except by or with the consent of the Board of Trade?

There is no space to discuss the provisions on allotments and prospectuses, on the liability of debenture trustees, on the names of companies, on receivers and on winding-up, and many other matters of importance cannot even be mentioned. Legal practice and theory will have to live with the new law (soon to be embodied in a consolidating statute) for many years. A cluster of case law will surround many of its provisions and one may express the hope that this far-reaching reform of company law will be used by the academic side of the profession as an opportunity for the extension of legal research into this field.

The Act is being put into force by stages under Orders made by the Board of Trade by virtue of section 123 (2) of the Act. At the time of going to press a number of provisions have been made operative as from December 1, 1947 (S. R. & O., 1947, No. 2503). They include the sections referring to investigations, to the alteration of the company's objects, to the new powers to alter the memorandum and to names of companies.

O. KAHN-FREUND.

RECENT PERIODICAL LITERATURE

Jurisprudence. The *Columbia Law Review* devotes a series of articles to the work of the Supreme Court during the 1946 term as follows: F. HARPER: The Supreme Court and the Conflict of Laws, 47 Col.L.Rev. 883. L. B. BOUDIN: The Supreme Court and Labor, 47 Col.L.Rev. 979. S. S. ZLINKOFF and R. C. BARNARD: The Supreme Court and a Competitive Economy (trademarks, patents and anti-trust laws), 47 Col.L.Rev. 914. O. K. FRAENKEL: The Supreme Court and Civil Rights, 47 Col.L.Rev. 953. J. FRANK: A Plea for Lawyer-Schools, 56 Yale L.J. 1303; the author suggests that law students should not be given too theoretical a training. L. M. HYDE: Judges: Their Selection and Tenure, 22 N.Y.U.L.Q.Rev. 389. M. S. MCDOUGAL: The Law School of the Future: from Legal Realism to Policy Science in the World Community, 56 Yale L.J. 1345. R. POUND: A Generation of Improvement of the Administration of Justice, 22 N.Y.U.L.Q.Rev. 369. G. W. PATON and G. SAWER: *Ration decidendi* and *obiter dictum* in Appellate Courts, 63 L.Q.R. 461; the authors discuss such problems as equal divisions, conflicts between opinions supporting an order, alternate reasons for an order, the authority of *obiter dicta,* joint opinions, and the contest between flexibility and certainty in the law. R. R. TEMPLE: Court Officers: Their Selection and Responsibilities, 22 N.Y.U.L.Q.Rev. 401.

Law of Property. J. G. FLEMING: Secret Trusts, 12 Conv.(N.S.) 28. J. F. GARNER: Statutory Charges on Land, 12 Conv.(N.S.) 45. H. POTTER: The Twilight of Landowning, 12 Conv.(N.S.) 3; this is a discussion of the Agriculture Act, 1947. J. MUIR WATT: The New Agriculture Act and Agricultural Tenancy Agreements, 12 Conv.(N.S.) 15.

Mercantile Law. H. LEVY: Certification Marks, 2 Industrial L.Rev. 114; the author examines the problem of marks guaranteeing a certain standard of quality.

Industrial Law. M. M. KAMPELMAN: The United States Conciliation Service, 31 Minn.L.Rev. 680.

Law of Evidence. W. J. DOBIE: Statements to the Police as Evidence, 59 Jurid.Rev. 122. M. L. ROSENZWEIG: The Law of Wire-Tapping, 32 Cornell L.Q. 514; is evidence so obtained admissible?

Civil Procedure. H. P. CHANDLER: Making the Judicial Machinery Function Efficiently, 22 N.Y.U.L.Q.Rev. 445. A. J. KEEFFE and J. J. ROSCIA: Immunity-Sentimentality, 32 Cornell L.Q. 471; this is an examination of the problem of the immunity from jurisdiction in any of the United States enjoyed by persons not resident in the State. H. D. NIMS: Pre-Trial in the United States, 25 Can.B.Rev. 697; pre-trials are informal meetings presided over by the trial judge and designed to bring about either an amicable settlement or at least a substantial simplification of the issues so as to shorten the subsequent trial. P. WRIGHT: The Open Court: The Hall-Mark of Judicial Proceedings, 25 Can.B.Rev. 721.

Criminal Law and Procedure. B. KARPMAN: An Attempt at a Re-evaluation of Some Concepts of Law and Psychiatry, 38 J.Crim.L. 206. J. C. KNOX: Jury Selection, 22 N.Y.U.L.Q.Rev. 433. G. H. STEVENSON: Insanity as a Criminal Defence: the Psychiatric Viewpoint, 25 Can.B.Rev. 731.

Conflict of Laws. J. F. GARNER: Jurisdiction and the Choice of Law in Nullity Suits, 63 L.Q.R. 486. R. K. KURATOWSKI: Torts in Private International Law, 1 Internat.L.Q. 172.

International Law. I. CAMPBELL: Some Legal Problems Arising Out of the Establishment of the Allied Military Courts in Italy, 1 Internat.L.Q. 192. A. V. FREEMAN: War Crimes by Enemy Nationals Administering Justice in Occupied Territory, 41 Am.J.Int.L. 579. L. GROSS: The Charter of the United Nations and the Lodge Reservations, 41 Am.J.Int.L. 531; the author investigates the extent to which the Charter incorporates or considers the reservations which prevented the United States from joining the League of Nations. G. IRELAND: *Ex post facto* from Rome to Tokyo, 21 Temple L.Q. 27; the author expresses the misgivings felt in many quarters about the international war crimes trials. H. KELSEN: Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? 1 Internat.L.Q. 153. H. LAUTERPACHT: The Subjects of the Law of Nations (Part 1), 63 L.Q.R. 438. L. PREUSS: Immunity of Officers and Employees of the United Nations for Official Acts: The *Ranallo Case,* 41 Am.J.Int.L. 555. G. SCHWARZENBERGER: Patterns of International Law and Organisation in the Atomic Age, 59 Jurid. Rev. 95; this is a chapter of the author's *Manual of International Law,* published recently. W. R. SHARP: The New World Health Organisation, 41 Am. J.Int.L. 509.

W. A. STEINER.

ANNOUNCEMENT

THE Committee are glad to announce that the *Review* is now showing a small profit. While this does not enable them to pay for articles contributed, provision can be made for grants in aid of expenses to contributors in cases where their articles have called for extra research work, extra copying, translating, or in other ways may justify a special fee. The Editorial Committee will be pleased to consider applications from would-be contributors for such grants.

NOTES OF CASES

MOTIVE AS AN ELEMENT OF CRUELTY IN DIVORCE

It sometimes happens that, as the machinery of justice circles round the social framework, a decision of a judge working under the pressure of a great volume of litigation flies off at a tangent. The words of some other judge may be misinterpreted; some 'obiter dicta' enunciated in a previous case without much thought may be applied without being tested further; some maxim may catch the imagination and override the better judgment; some fallacious argument may be accepted whose inconsequence would on second thoughts become obvious; or an analogy may find approval which deeper consideration would show to be irrelevant. These are but some of the pitfalls into which judges may easily be drawn, and it is the responsibility of the legal profession to scrutinise every reported decision with a view to detecting and causing to be corrected the resulting aberration before it achieves the position of general acceptance.

The recent decision of Finnemore, J., in *Squire* v. *Squire* [1] seems to be a case in point. The facts were quite simple. The wife, after various operations, and as a result of illness, suffered constantly and severely from insomnia. She required her husband to read her to sleep night by night, and, not liking anyone but her husband to attend to her, insisted on his dressing her, bathing her, and giving her other personal attention. Under the strain of these demands the husband's health broke down. Finnemore, J., held that, as the wife's conduct arose from illness, it did not amount to cruelty, to constitute which the conduct must be deliberate, malignant and intended. This conclusion was reached after consideration of the recent cases of *Astle* v. *Astle*,[2] *Horton* v. *Horton* [3] and *Atkins* v. *Atkins*,[4] of which the learned judge said: 'All those cases emphasise, as I think all the cases before 1937 laid down, the fact that cruelty must be deliberate, malignant, and intended'.

If one consults the cases before 1937, whose effect Finnemore, J., appears to have presumed, one discovers not merely that they were contrary to the dicta on which he relied, but that those dicta were in fact due to some confusion of words, if not of thought. There are two cases directly on the question of the relevancy of the motive behind the respondent's cruelty. The first is *Kirkman* v. *Kirkman*,[5]

[1] [1947] 2 All E.R. 529.
[2] [1939] P. 415; [1939] 3 All E.R. 967.
[3] [1940] P. 187; [1940] 3 All E.R. 380.
[4] [1942] 2 All E.R. 637.
[5] (1807), 1 Hag.Con.C. 409.

where the wife's jealousy led to the commission of acts of cruelty. It was argued for her that, as she was not actuated by spite, the husband was not entitled to a decree of judicial separation. This argument found little favour with Sir William Scott, who pointed out that 'jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone; it cannot be necessary that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity'. This decision was followed by a similar refusal to enter into a husband respondent's motives in *Holden* v. *Holden*,[6] in which Sir William Scott's words were even more emphatic: 'The court has had frequent occasion to observe that everything is, in legal construction, *saevitia* which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive such treatment proceeds; it may be from turbulent passion, or sometimes from causes which are not inconsistent with affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated'.

The effect of these cases was well summed up by Lord Penzance (then Wilde, J.O.,) in *Hall* v. *Hall*[7]: 'With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial'. If a more recent opinion be sought, it is to be found in Lord Simon's judgment in *Watt* (or *Thomas*) v. *Thomas*[8]: 'Neither can the husband's right to a decree for cruelty be denied on the ground of the wife's pathological condition which was producing increased nervous irritability'.

There are many other cases which seem relevant to the present discussion. Conduct due to intemperance, or to delirium tremens brought about by intemperance, has been held cruelty.[9] A 'prima facie' case of cruelty is made out by proof of communication of venereal disease.[10] The court has granted relief where the shock of the commission and conviction of a serious crime of one spouse

[6] (1810), 1 Hag.Con.C. 453.
[7] (1864), 3 S. & T. 347 at 349.
[8] [1947] 1 All E.R. 582 at 586.
[9] *White* v. *White* (1859), 1 S. & T. 591; *Marsh* v. *Marsh* (1858), 1 S. & T. 312.
[10] *Browning* v. *Browning*, [1911] P. 161.

causes injury to the other's health.[11] In *Curtis* v. *Curtis*[12] the court regarded the husband's harsh treatment of his wife, brought about by brain fever, which affected her health, as cruelty. All these decisions were reached without a discussion of motive. If the test of 'deliberation, malignity, and intention' had been applied, different conclusions would no doubt have been reached. The reason for its exclusion is simply that the protection which the court can give by its decree is just as necessary (perhaps even more so) where the danger is created by some abnormality as when created by conduct originating from spite or hatred.

With the above volume of evidence that motive is not a material factor in the consideration of cruelty, how did the learned judge in *Squire* v. *Squire*[13] find himself able to reach a contrary decision? He started by considering *Astle* v. *Astle*,[14] or rather by quoting the headnote from the Law Reports: 'Intention or malignity is an essential element in the matrimonial offence of cruelty, and there can be no such cruelty if the accused spouse's state of mind is such that he does not know the nature and quality of his acts'. While the first clause of this headnote is taken almost verbatim from the judgment of Henn Collins, J., it is clear that he decided only what was stated in the second part of the sentence. It is obvious from the rest of the judgment that 'malignity' was used as synonymous with intention, and in fact in *Kellock* v. *Kellock*,[15] decided by Henn Collins, J., on the same day, 'malignity' appears to be used to denote the state of mind in which the party 'knows what he is doing and that what he is doing is wrong'—*i.e.*, intention. Therefore *Astle* v. *Astle*[14] affords no authority for the statement that malignity in the sense of malice is an element of cruelty.

Next, Finnemore, J., considered *Horton* v. *Horton*.[16] In that case the question was: if injury result to one spouse from the conduct of the other, what quality must that conduct possess to constitute cruelty? The following conclusion was reached by Bucknill, J.,[17] and quoted in *Squire* v. *Squire*[13]: 'Mere conduct which causes injury to health is not enough. A man takes the woman for his wife for better, for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health'. Let us examine this passage sentence by sentence.

(a) The first sentence is merely the conclusion which the following three sentences support.

[11] *Thompson* v. *Thompson* (1901), 17 T.L.R. 572; *Bosworthick* v. *Bosworthick* (1901), 18 T.L.R. 104.
[12] (1858), 1 S. & T. 192.
[13] Note 1, *supra*.
[14] Note 2, *supra*.
[15] [1939] 3 All E.R. 972.
[16] Note 3, *supra*.
[17] [1940] P. at 193.

(b) It is submitted that the 'taking for better, for worse' argument is false. It is true that this was, and still is, the church dogma regarding marriage, but, in so far as divorce has been recognised, the law has created an exception, and it is therefore no answer to a charge of cruelty to say: 'You took me for better, for worse'. If it were, there would seem to be no reason why one should not also excuse adultery, desertion and every other matrimonial offence on this ground. What is in fact being attempted is the definition of the limits of an exception to a rule by a statement of that rule; that is a logical impossibility.

(c) The next argument is based on the decision in *Russell* v. *Russell*,[18] and, taken by itself, the sentence is quite correct. In *Russell* v. *Russell* [18] the House of Lords was presented with two criteria of cruelty—the first, that of conduct causing injury or danger of injury to body or health; the second, that of conduct rendering a normal matrimonial relationship impossible. The majority chose the former standard. But that does not mean that relief is to be refused if the injury to body or health arises from conduct making a happy matrimonial life impossible; that is, the tests that were suggested are not mutually exclusive. Yet that seems to be the implication of Bucknill, J.'s words, considered in their context.

(d) Just as the third sentence in the passage under consideration seems to have been due to a misunderstanding of the judgment in *Russell* v. *Russell*,[18] so the last sentence seems to spring from false reasoning from Lord Herschell's remark in that case [19] that 'there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that relief [*i.e.*, divorce for cruelty] could not be obtained'. It no more follows from this that to obtain relief one must prove 'wilful and unjustifiable acts inflicting pain and misery' [20] than it would follow from the fact that there may be many wilful and unjustifiable acts causing damage which will not give rise to an action in tort (a statement one might well find in a book on tort) that to succeed in such an action one would have to prove wilful and unjustifiable conduct. Yet that is the very error into which Bucknill, J., appears to have fallen.[21]

Finnemore, J., drew the conclusion from *Horton* v. *Horton* [22] that conduct which 'was merely the development and manifestation

[18] [1897] A.C. 395.
[19] [1897] A.C. at 445.
[20] *Horton* v. *Horton*, [1940] P. 187 at 193.
[21] A similar case is to be found in *Kellock* v. *Kellock*, [1939] 3 All E.R. 972 at 974, where Henn Collins, J., states that the respondent's acts had been 'made to appear to proceed from malignity', although in the case he was quoting—*Kirkman* v. *Kirkman*, 1 Hag.Con.C. 409—the statement was that to prove cruelty 'it cannot be necessary . . . that it should be made to appear to proceed from malignity'.
[22] Note 3, *supra*.

of her normal character '[23] was not cruelty.[24] This conclusion appears to rest on arguments (b) and (c) considered above, and, by reason of their invalidity, must also be considered incorrect.

Atkins v. *Atkins*[25] was the last case considered by Finnemore, J. He quoted from the judgment of Henn Collins, J.: ' The Legislature has said that [cruelty] shall be a ground for dissolution, but that has not altered the quality of what is known as cruelty in this court, nor has it altered the reasons which actuate the court in its proceedings, which are simply these : the defaulting spouse has been guilty of deliberate behaviour, the effect of which either had been or must be, in the ordinary course, to injure the health, either bodily or mental, of the other spouse '.[26] From this passage the learned judge has extricated the word ' deliberate ', but, as with ' malignant ' in *Astle* v. *Astle*,[27] it is clear that it means ' intended '. But it is only the conduct which must be intentional; there is nothing in this passage to suggest that the consequences must also have been intended; it is plain that the consequences were to be considered *simpliciter*.

To sum up, the decision in *Squire* v. *Squire*[28] is based on a misunderstanding of a remark in *Astle* v. *Astle*,[29] unwarranted dicta in *Horton* v. *Horton*[30] and an unjustified reliance on *Atkins* v. *Atkins*,[31] and the new rule so formulated that malice is an essential element of cruelty is bolstered up by the supposition that the older cases decided the very opposite from what they actually laid down. In addition, the discredited ' for better, for worse ' principle is once more resurrected. It is hardly surprising, therefore, if we question the authority of *Squire* v. *Squire*.[32]

Arriving at a decision is one thing; its value is another. We must therefore consider the desirability of the rule enunciated by Finnemore, J. It is submitted that the decision is contrary to the present tendency of, and public feeling about, the divorce law. The breakdown of a marriage is no longer regarded as of necessity the fault of one of the parties. While we still talk of matrimonial offences, even the law has recognised this in its grant of relief in the case of incurable insanity. Is this the time to swing back as regards cruelty in the direction of the fault principle to an extent never envisaged even by the ecclesiastical courts? Further, where does malice end and illness start? No doubt the court would draw a

[23] [1947] 2 All E.R. at 532.
[24] Contrast *Gardner* v. *Gardner*, [1947] 1 All E.R. 630, where Hodson, J., however, paid lip service to the dicta in *Horton* v. *Horton* by terming the wife's unnatural sexual practices ' wilful and unjustifiable acts '.
[25] Note 4, *supra*.
[26] [1942] 2 All E.R. at 638.
[27] Note 2, *supra*.
[28] Note 1, *supra*.
[29] Note 2, *supra*,
[30] Note 3, *supra*.
[31] Note 4, *supra*.
[32] Note 1, *supra*.

line somewhere, just as it has drawn a line through patterns of causes. While there exists consequently no insuperable obstacle, difficulties would arise, similar to those found in formulating a test of causation, whose entry into the law should not be allowed without very good reason.

If we reject the criterion of malice, what shall we put in its place? Reference may again be made to Sir William Scott's statement in *Holden* v. *Holden*,[33] that 'everything is, in legal construction, *saevitia* which tends to bodily harm, and in that manner renders cohabitation unsafe'. It may be doubted whether the learned judge would have committed himself so far if the point had been before him for decision, and his words should be regarded rather as an overstatement of the case for the exclusion of motive. The real answer seems far simpler. Cruelty is a question of fact, and thus for the jury to decide. The only point to be noticed is that the law will not grant relief for cruelty unless there is injury or danger of injury to body or health. That is the distinction between cruelty as understood by the man in the street and legal cruelty. To add other elements seems to be setting on the path of justice one more carriage with an unnecessary fifth wheel. It is submitted that Professor Winfield's observation that all the 'cases on negligence in which duty was under discussion . . . could . . . have been just as well decided on some ground not depending on duty at all—sufficiency of evidence for the jury, contributory negligence, remoteness of damage, inevitable accident, "volenti non fit injuria"', has (mutatis mutandis) equal force in the discussion of the problem raised by *Squire* v. *Squire*[32] to settle the difficulties with which Finnemore, J., seems to have considered himself confronted.

K. T. SAMSON.

LICENCE—METHOD OF REVOCATION

IT is unfortunate that there appears in the headnote to the All England Report of *Winter Garden Theatres (London), Ltd.* v. *Millenium Productions, Ltd.*, [1947] 2 All E.R. 331, the words 'Held, (i) . . . *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, "*no longer law*"'. In only one of the five speeches, that of Viscount Simon, is there any suggestion that, within the limits that it set itself, *Wood* v. *Leadbitter* should no longer be regarded as an authority. Lord Simon's comments on the case are entirely *obiter*, and were largely contradicted by Lord Porter, who drew from this traduced authority a principle that was very material to the actual decision in the instant case, namely, that a licence is prima facie revocable.

[33] Note 6, *supra*.

The truth of the matter is that the instant case does not really help either way in the classic dispute surrounding *Wood* v. *Leadbitter* and *Hurst* v. *Picture Theatres, Ltd.* (1915) 1 K.B. 1. The distinction between revoking the licence and breaking the contract never arose. Contrast another recent case, *Thompson* v. *Park*, [1944] 1 K.B. 410 (C.A.).

Winter Garden Theatres v. *Millenium* is, however, important for two reasons. In the first place, another blow was given to the dictum of Lord Selborne, *Llanelly Railway & Dock Co.* v. *L.N.W.R.* (1875), L.R. 7 H.L. 550, that ' an agreement de futuro, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon anyone alleging that it is not perpetual the burden of proving that allegation '. There is remarkably little authority on the construction of written agreements which are silent as to any time limit for the running of the contract, but the instant case can now be added to *Crediton Gas* v. *Crediton U.C.*, [1928] 1 Ch. 448 (which was not cited), as ammunition against the view that there is a presumption in favour of perpetuity.

Secondly, there was an interesting division of the high judicial opinion upon the nature of the time to be given to the licensee to vacate the premises. In *Minister of Health* v. *Bellotti*, [1944] 1 K.B. 298, Greene, M.R., asked ' what is a licensee, in the particular circumstances of this case, entitled to expect in the matter of the termination of his licence? ' He answered, ' where a licence is revoked, the licensee has, in spite of the revocation, whatever in the circumstances is a reasonable time to enable him to remove himself and his possessions from the scene of the licence '. From these and other words in his judgment it is clear that the Master of the Rolls took the view that the licence could be (and was) revoked instanter, but that the licensee should have, after the revocation, time to pack up and find somewhere else to go. Furthermore there was no need for the licensor to specify in his notice of revocation any particular time, and if he did specify a particular period which the court considered too short in all the circumstances, this did not invalidate the revocation.

The problem of the ' packing-up period ', to use Lord MacDermott's phrase, did not arise directly in the instant case since the respondents were, for reasons immaterial to this note, precluded from alleging that reasonable notice had not been given or that they had no time to pack up. But since the point is obviously of importance to all licensors, it was dealt with obiter by three members of the House.

Lords MacDermott and Porter leant towards a refinement of the *Bellotti* approach. They agreed that the ' packing-up period ' ran after the licence had in fact been revoked, but they considered that notice of intention of revoke was also necessary in most cases. ' I take the provisional view that a licence is prima facie terminable at

once after notice to determine has been given, but that the licensee must be given a reasonable time to vacate' (at p. 340, *per* Lord Porter). 'One who remains on the land of another after his license to use it has terminated will not be considered a trespasser before he has had a reasonable time in which to vacate the premises. . . . This period of grace . . . exists for gratuitous as well as for contractual licensees, and on that account must I think be generally ascribed to a rule of law rather than to an implied stipulation' (at p. 344, *per* Lord MacDermott). He then goes on to show that in most contractual licences there must be read an implied term (if there is no express term) giving reasonable notice of intention to revoke, and that this contractual period is additional to and independent of the 'packing-up period'. Moreover the licensor must specify the length of the former in his notice. 'I am not unmindful that an implication of this nature makes it incumbent upon the licensors to specify a reasonable period and that they may not be fully versed concerning all the relevant circumstances when they have to do so" (at p. 345).

Lord Uthwatt, however, held a different view. He would have none of the 'packing-up period', chiefly on the ground that no 'rent' would be payable for such a period (cf. the law of emblements as applied to tenants-at-will whose tenancy is terminated).

'The next question is whether the notice given must be a reasonable notice or whether it may be a notice operating at once to determine the licence, the licensees in that event having a reasonable time within which to vacate. In my opinion, it is the former' (at p. 341). He also discusses the difficulties of the licensor in deciding what length of notice to give, particularly as actual user, as well as contemplated user, must be taken into account. He concludes that the licensor may require the licensee to furnish him with information to help him to decide.

There is thus a complete spectrum of high judicial opinion upon the periods and notices required to oust licensees for valuable consideration. Greene, M.R. (and more specifically MacKinnon, L.J.), in the *Bellotti Case decided* that notice specifying a time of revocation was generally unnecessary, but that there was always to be allowed a packing-up period. The majority in the *Winter Garden Case thought* that both periods were necessary, while Lord Uthwatt thought that only the prior notice specifying a time was essential. Licensors must envy the relative certainty enjoyed by landlords.

C. FLETCHER-COOKE.

CASE LAW IN DIVISIONAL COURTS

AFTER the consideration which the Court of Appeal has recently given to the binding effect of precedent it was in *Police Authority for Huddersfield* v. *Watson*, [1947] K.B. 842 (Div. Ct.), the

turn of a Divisional Court to pronounce on the application of the doctrine of stare decisis at the present day. Following the lead given by the Court of Appeal Lord Goddard, C.J., said that if in a court most of whose decisions are reviewable, although only by leave, in the House of Lords, those decisions are binding on the court, how much more important it is that a Divisional Court that is a final court should follow its own decisions and consider that it ought to give full force and effect to them, otherwise a great deal of uncertainty would be introduced into the law. A certain number of authorities on the weight to be attached to precedents issuing from a Divisional Court were referred to but justice was hardly done to the distinction between precedents of Divisional Courts which are and those which are not final courts of appeal (cf. the present writer's study 'Divisional Court Precedents', *Modern Law Review*, Vol. 9 (1946) 257). The court was presented with the argument that a court is bound by decisions of a court of co-ordinate jurisdiction if they are subject to appeal, though not otherwise, but Lord Goddard, C.J., with whom the other two members of the court agreed, countered this by saying that he was not considering the decision of a court of co-ordinate jurisdiction, such as the three Superior Courts were at common law, but a decision of one court, namely, the Divisional Court. The instances in which this common law distinction has been acted on in Divisional Courts were not referred to. With regard to 'the dictum of Grove, J.', the Lord Chief Justice expressed the view (p. 848) that a judge of first instance is bound to follow a decision of a Divisional Court as well as a decision of the Court of Appeal and of the House of Lords. No citation is given either in the judgments or the arguments of counsel for Grove, J.'s, dictum; it is to be found in *Casson* v. *Churchley* (1884), 53 L.J.Q.B. 335, 336, cf. 'Divisional Court Precedents', p. 259 where it is discussed.

The Divisional Court in the *Huddersfield Case* has followed the example of Lord Alverstone, C.J., in applying the principle of stare decisis in Divisional Courts in the same manner in which the Court of Appeal applies it in that court, rather than the example of Lord Russell of Killowen, C.J., and Lord Coleridge, C.J., who applied the principle in a special and more elastic manner which they deemed to conform to common law doctrine and the constitution and functions of Divisional Courts.

In *L. C. C.* v. *Shelley*, [1947] 2 All E.R. 320 (Div. Ct.) the Divisional Court felt itself bound to follow *R.* v. *Snell, Ex p. Marylebone B. C.*, [1942] 2 K.B. 137 (Div. Ct.), Lord Goddard, C.J., saying (p. 324), 'In my opinion these cases are very fit to be taken before a court which has the power to reconsider *Snell's Case*'. There is no suggestion of summoning a special sitting of the Divisional Court, in the manner of Lord Russell of Killowen and Lord Coleridge, in order that the case

might be reconsidered by a Divisional Court itself. Yet according to an observation of Lord Goddard, C.J., in *Edwards* v. *Jones*, [1947] 1 All E.R. 830, 833 (Div. Ct.), the weight of a Divisional Court precedent does still to some extent depend on the number of judges of whom the court in question was composed, for the Lord Chief Justice said of an earlier Divisional Court decision: 'I should have no hesitation, if necessary, in differing from the decision in that case, not merely because we are sitting now as a court of three, and that was a court of two, but also because the case was not argued for the defendants, who did not appear, and when a case has been argued only on one side, it has not the authority of a case which has been fully argued'. Another recent case, *Moore* v. *Hewitt*, [1947] K.B. 831 (Div. Ct.), shows that the exception to the rule that the Court of Appeal is bound by its own decisions which exists when the previous decision was given per incuriam applies in Divisional Courts also. Lord Goddard, C.J., stated (p. 835) that a decision is given per incuriam where the provisions of a statute or the authority of a case has not been brought to the attention of the court. His lordship applied this exception to a case in which authorities of equal standing (namely, other Divisional Court rulings) had been overlooked.

The Lord Chief Justice in the *Huddersfield Case* remarked (loc. cit. 847, 848) that he knew that in the writings of various eminent people the doctrine of stare decisis had been canvassed from time to time but that, in his opinion, 'if one thing is certain it is that stare decisis is part of the law of England, and in a system of law such as ours, where the common law, and equity largely, are based on decisions, it seems to me it would be very unfortunate if a court of final appeal has given a decision and has laid down a definite principle and it cannot be said the court has been misled in any way by not being referred to authorities, statutory or judicial, which bear on the question, that it should then be said that that decision was not to be a binding authority'. But from the time when stare decisis became part of the law of the land there have always been applications of the doctrine peculiar to different courts. It may, perhaps, be hazarded that if those who have canvassed the merits and demerits of the doctrine had devoted more attention to an analysis of the relevant decisions and dicta on the operation of the doctrine these special applications would not so easily have escaped due attention. Is the stiffening in the judicial application of the doctrine in modern times in part a reaction against criticisms directed at the doctrine itself?

The latest eminent person to canvass stare decisis is Professor Stone. After weighing the jurisprudential issues involved Professor Stone's conclusion is (*The Province and Function of Law* (1947), p. 188, n. 223) that 'the question whether a court is

" bound " by a single precedent must remain largely meaningless, with respect, however earnestly it continues to be discussed by courts and text writers. See the remarkable collection of such discussions in " Precedent in Equity " (1941), 57 L.Q.R. 245, 263–79 ' by the present writer. In view of the nature of much modern literature on stare decisis it is understandable that a fairly full reference to the sources in a study of precedent should appear remarkable. Academic studies of stare decisis often point their own moral of the amount of notice which should be taken of judicial authorities. Whether the lavish display of references to minor articles in remote reviews should be regarded as a compensation gesture for abstinence from adequate citation of judgments is a question best answered by a jurist of the psychological school. After discussing this school and Professor Llewellyn and the American ' realists ', Professor Stone says (op. cit. 416, n. 138): ' A good recent example of what Professor Llewellyn is attacking may, perhaps, be seen in Mr. W. H. D. Winder's attempt (" Precedent in Equity ", loc. cit.) to derive the rule followed from a collection of judicial dicta, mainly obiter, on the point '. The object of that article was the limited one of trying to discover what rule or rules the courts profess they are, as a matter of law or practice, bound to follow. The professed rules of stare decisis must be discovered before they can be convincingly criticised. In general, writers on case law have put comparatively little energy into such a discovery, perhaps because they are anxious to hasten on to attack what they believe they have already found. Unlike stare decisis in the House of Lords, the Court of Appeal and courts of first instance, stare decisis in Divisional Courts has not yet attracted the attentions of the people to whom the Lord Chief Justice refers in his judgment in the *Huddersfield Case*; the time is now ripe for those attentions to commence.

W. H. D. Winder.

CHOICE OF LAW IN NULLITY PROCEEDINGS

A jurisdictionally competent court must pronounce a decree of annulment in accordance with the substantive law ' of the state which determined the validity of the marriage with regard to the matter alleged to be the cause of nullity '.[1] The several features of the marriage contract are governed by distinct conflict rules, as *e.g.*, formalities by the *lex loci contractus*[2] and capacity of the parties by the law of their pre-marital domicile.[3] The same

[1] American Restatement, 1934, § 136.
[2] *Berthiaume* v. *Dastous*, [1930] A.C. 79; *Apt* v. *Apt*, [1947] 1 All E.R. 620; aff. *ibid.* 677.
[3] *Brook* v. *Brook* (1861), 9 H.L.C. 193; *Re Paine*, [1940] Ch. 46.

principle is applicable to defects resulting in complete nullity and voidability. With regard to the latter, however, difficulties of characterisation are not infrequently caused, since it is by no means self-evident whether to class impotence, wilful refusal to consummate and similar causes as appertaining to one category or another. This problem arose in the recent case of *Robert* v. *Robert*.[4] A marriage had been celebrated at St. Peter Port between two persons domiciled in the Isle of Guernsey. The putative wife petitioned the English High Court for a decree of nullity on the ground of the other party's wilful refusal to consummate. In this particular instance, a decisive choice was not of paramount importance, since both English and Guernsey law recognised this cause of invalidity. Barnard, J., considered that 'in order to be justified on principle as a ground for annulment and not dissolution, it must be considered as a defect in marriage, an error in the quality of the respondent', but 'if I am wrong, and wilful refusal to consummate a marriage was to be considered as something affecting the capacity of one of the parties to contract marriage, then I am bound by the decision . . . in *Sottomayor* v. *De Barros* to apply the *lex domicilii*'.[5] It is submitted that the second alternative is preferable, since both analytically and historically it presents the closest analogy to impotence which unequivocally relates to the capacity of the præpositus.[6] No other decision elucidates this issue, and it is only lately that the choice of law problem in voidable marriages has been squarely faced.[7] Thus in *Easterbrook* v. *Easterbrook*[8] and *Hutter* v. *Hutter*[9] decrees were granted by Hodson and Pilcher, JJ., annulling marriages celebrated in England between 'wives' domiciled in this country and husbands domiciled in Canada and the U.S.A. respectively. Although the point was not taken, there can be little doubt that by the law of the husbands' domicile, refusal to consummate was not a sufficient cause for nullity[9a]. The question remains, Did the court apply English law as the *lex loci celebrationis* or as the *lex domicilii* of one of the parties? The suggestion that the law of the *husband's* domicile was exclusively applicable must be discountenanced in view of the established principle that a contractual defect by the law of domicile of either party invalidates the marriage contract.[10] For this reason, these decisions must be considered as correct, even if wilful refusal to consummate be deemed a defect of capacity. It is arguable, however, that the court applied English law as the

[4] [1947] 2 All E.R. 22.
[5] At p. 24.
[6] Cf. judgment of du Parcq, L.J., in *Cowen* v. *Cowen*, [1946] P. 36.
[7] See Cheshire, *Private International Law* (3rd ed.), pp. 458 *et seq.*
[8] [1944] P. 10.
[9] [1944] P. 95.
[9a] See Falconbridge, *Conflict of Laws*, p. 681.
[10] *Re Paine*, [1940] Ch. 46. *Contra* Cheshire, pp. 266 *et seq.*, and p. 459.

lex fori or, for want of proof to the contrary, assumed an identity between the law of the husbands' domicile and English internal law. We may well shrink from the former interpretation in view of its emphatic rejection by Jones, J., in *Robert* v. *Robert*.[11]

Professor Cheshire suggests the desirability of applying the law of the domicile on the ground that voidability raises an issue of status. By this he appears to mean the domicile of the parties at the time when the proceedings for nullity are commenced, not the *lex domicilii* at the time of the marriage. Thus, ' strict principle may perhaps demand . . . that annulment of a voidable marriage, since it directly affects status should be submitted exclusively to the court and to the law of the domicile '[12] but ' where the marriage is alleged to be void *ab initio* . . , the proper law varies with the ground upon which the allegation is based. The petition attacks the validity of the marriage . . .'.[13] It is submitted with the greatest respect that this contention proceeds on the hitherto unsubstantiated premise of identifying divorce and voidability. Whatever be the merits of this analogy for the purpose of determining jurisdictional competence, it is indisputable that, since a decree of nullity, both in respect of void and voidable marriages, destroys the marriage *ab initio* on ante-nuptial grounds, the law of the domicile at the time of the proceedings is altogether irrelevant. Two illustrations will suffice:

(a) A domiciled Englishman marries his divorced wife's sister in Denmark. This marriage will remain invalid even if the parties acquire a domicile of choice in that country.[14]

(b) In the converse case, a domiciled Dane marries in these circumstances in France. His subsequent acquisition of an English domicile will not entitle an English court to annul the marriage.[15]

There is no justification for applying a contrary principle to defects resulting in voidability. Thus, two domiciled French citizens go through a form of marriage in Paris and subsequently acquire a permanent home in this country. An English court, it is submitted, may not annul the marriage on the ground that one of the parties wifully refused to consummate it. Similarly, there is no authority for the proposition that a German tribunal may pronounce a decree of nullity with respect to a marriage contracted by two English domiciliaries in London, on the ground that the wife was mistaken as to the personal attributes of her husband, even although the parties had at the time of the proceedings acquired a domicile in Germany.[16]

[11] [1947] 2 All E.R. 22, 24. But see *Mehta* v. *Mehta*, [1946] 1 All E.R. 690.
[12] At pp. 446–7. This passage is more explicit than the apposite comment at pp. 458–9.
[13] At p. 459.
[14] Cf. Wolff, *Private International Law*, p. 341.
[15] Cf. Stone, J., in *Yarborough* v. *Yarborough* (1933), 290 U.S. 202.
[16] Cf. *Mitford* v. *Mitford*, [1923] P. 130.

The fact that the causes of voidability, in theory at any rate, relate to defects of an ante-nuptial character is an incontrovertible feature of our system of our matrimonial law. The superficial appearance of wilful refusal to consummate and impotence as *causæ subsequentes* rests on inadequate analysis, and is disproved by the principle that a refusal, following on consummation, does not entitle to this form of drastic relief, although it may afford a defence to a petition for restitution of conjugal rights.[17] This was recognised by Jones, J., in *Robert* v. *Robert* by the following observation: 'A peculiar feature of this impediment consists in the voidability of the marriage being based on an ante-nuptial fact. . . . Wilful refusal to consummate a marriage in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage'.[18] The distinction between domicile *tempore celebrationis* and *tempore judicii* has not always been clearly recognised, because it is only in comparatively rare cases that the domicile has not remained constant at all material times. These '*raræ aves*', however, are of increasing appearance, as evidenced by *Salvesen* v. *Administrator*[19] and *Manella* v. *Manella*.[20] It is worth remembering that Professor Beale directed his attack against the former decision primarily on the ground that the courts of a domicile acquired by the parties subsequently to the celebration of the marriage were considered competent to render a decree of annulment.[21] The unequivocal acceptance of the status approach in the *Salvesen Case* does not imply the application by the domiciliary court of its internal law as 'the law of the domicile', since in nullity proceedings, unlike divorce, the courts must take cognisance of those systems of law which determine the *original* validity of the marriage. It is believed that those who advocate the exclusive competence of the courts of domicile in cases of voidability have not fully adverted to these considerations.[22]

In my submission, voidability is not the *cause* but the *consequence* of a defective marriage. If the petitioner relies on the allegation of impotence, this ground must initially be characterised as appertaining to capacity.[23] Since the latter is governed by the law of the pre-marital domicile of either party, he must then prove that this cause is recognised by the internal law of that legal system to which the court has referred the substantive issue. It is only at this stage that the inquiry becomes relevant whether the defect results in total nullity or

[17] *Synge* v. *Synge*, [1901] P. 317.
[18] [1947] 2 All E.R. 22, 24.
[19] [1927] A.C. 641.
[20] (1942), Ont.R. 630; (1942), 4 D.L.R. 712.
[21] Beale, *Conflict of Laws*, Vol. 1, p. 512.
[22] See note by F.H. in 60 L.Q.R. 115, 116; Cheshire, *P.I.L.* (2nd ed.), p. 340, (3rd ed.), pp. 447, 455, 458–9.
[23] To illustrate this point, we must disregard the claim of the *lex loci celebrationis*.

voidability. This is the more important, since the consequences of on infraction of matrimonial law vary considerably in different countries. Thus in Germany, non-age is an 'impedimentum impediens' which, like non-compliance with certain formalities of English law,[24] does not invalidate the marriage, once it has been celebrated.[25] An English court seised of a nullity petition by a domiciled Englishman who at the time of the marriage in Berlin was domiciled in Germany and below the statutory age, must determine the consequence of this defect in accordance with internal German law and therefore uphold the marriage, in the teeth of the consideration that by the test of English domestic law it would have been totally void. To take another pertinent example: two persons domiciled in Georgia, U.S.A. contract a marriage in Atlanta. They subsequently come to reside in this country, and the husband petitions for *nullity* on the ground that his wife was pregnant by another man at the time of the marriage. By the law of Georgia which is clearly applicable as the *lex domicilii* of both parties, this constitutes a cause of divorce.[26] It is submitted without hesitation that the High Court would have to desist from granting the desired decree, although by virtue of section 7 (1) (*d*) of the Matrimonial Causes Act, 1937, this now constitutes a defect resulting in voidability.

It is suggested with the greatest respect that Professor Cheshire advocates the adoption of a more liberal attitude towards these proceedings than has hitherto been accorded in decisions which continue to proceed upon the technical view that 'voidability' is the legal consequence of the existence of an ante-nuptial defect which has the effect of rendering a marriage void *ab initio* by a specific decree of nullity, at the suit of the 'innocent' party.

J. G. Fleming.

JURISDICTION IN NULLITY PROCEEDINGS

The line of cases from *White* v. *White*[1] to *Robert* v. *Robert*[2] appeared to establish that the English courts had jurisdiction to grant a decree of nullity where the petitioner was either domiciled or resident[3] in England, and that for this purpose there was no distinction between a void and a voidable marriage.[4]

This comfortable position has been disturbed by the decision of Jones, J., in *De Reneville* v. *De Reneville*.[5] In that case the wife

24 *R.* v. *Birmingham* (*Inhabitants*) (1828), 8 B. & C. 29; *Greaves* v. *Greaves* (1872), L.R. 2 P. & D. 423.
25 BGB 1303. Sir H. Duke in *Mitford* v. *Mitford* (*supra*) mistakenly treated the German decree, based on BGB 1333, as one of nullity, instead of voidability.
26 See Vernier, *American Marriage Laws*, Vol. 2, ss. 68–73.
1 [1937] P. 111.
2 [1947] 2 All E.R. 22.
3 Cf. *Hutter* v. *Hutter*, [1944] P. 95.
4 *Easterbrook* v. *Easterbrook*, [1943] P. 10.
5 [1947] 2 All E.R. 112.

petitioned on the ground of her husband's incapacity or wilful refusal to consummate the marriage, which had taken place in France. The wife was resident in England at the date of the petition, and at all material times the husband was domiciled and resident in France. The husband entered an appearance under protest to the jurisdiction.

It was held that the domicile of the wife was French, because she took her husband's domicile at marriage and could not thereafter acquire a separate one even though the marriage were voidable. The learned judge reached the conclusion, that a decree of nullity in such a case was not retrospective for the purposes of domicile, in reliance on *Fowke* v. *Fowke* [6] and *Adams* v. *Adams* [7] which were not matrimonial suits nor concerned with domicile, although it is true that the second was a Court of Appeal decision. No reference was made to recent cases [8] in the Divorce Division where it has been held that a wife may acquire a separate domicile.[8]

Having held that there was no English domicile, Jones J., distinguished *White* v. *White*, refused to follow *Robert* v. *Robert*, and dismissed the petition on the ground that the petitioner's residence in England was not sufficient to found jurisdiction in the absence of special circumstances or hardship and where the respondent had protested against the jurisdiction.

The reference to special circumstances and hardship in *White* v. *White* has thus borne fruit and resulted in uncertainty on a matter which should be certain. Moreover, the criterion of whether or not the respondent has protested against the jurisdiction (which also originated in the judgment in *White* v. *White*) is surely as bad a criterion as could be imagined for deciding whether jurisdiction exists. If a foreign court trying a conflict case were called upon to find the present English law of jurisdiction in nullity, it would be faced with an almost impossible task and one reflecting little credit on this branch of our law.

[N.B.—An appeal against the decision of Jones, J., has been heard, but judgment has not been given at the date of going to press.]

J. P. LAWTON.

[6] [1938] Ch. 774.
[7] [1941] 1 K.B. 536.
[8] *White* v. *White* (void marriage); *Easterbrook* v. *Easterbrook* (voidable marriage).

REVIEWS

THE TRIAL OF GERMAN MAJOR WAR CRIMINALS. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany. (London: H.M.S.O. Part 4, 443 pp., 6s. 6d. Part 5, 376 pp., 5s. 6d. Part 6, 340 pp., 5s. Part 7, 336 pp., 5s. Part 8, 307 pp., 4s. 6d.)

THE five volumes now under review comprise the official record of the proceedings of the Nuremberg Trial for the period January 7 to March 11, 1946. During this period the attention of the court was taken up with the prosecution case against each of the individual defendants, and the accounts read almost like a German Dictionary of National Biography. In addition, one finds here the case against aggressive war. In Part 4, M. de Menthon argued the illegality of war, and it is possible to find in his argument the precursor of the portion in the judgment which dealt with the criminality of war under the Pact of Paris, although that international instrument merely declared that the High Contracting Parties 'solemnly declare . . . that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy'. Despite the absence of any mention of criminality M. de Menthon declared that 'since 1928 International Law of war has emerged from its framework of regulations. It has gone beyond the empiricism of the Hague Convention to qualify the legal foundation of recourse to force. Every war of aggression is illegal, and the men who bear the responsibility for bringing it about place themselves beyond the pale of law. What does all this mean, if not that all acts, committed as a consequence of this aggression, for the carrying on of the struggle thus undertaken, will cease to have the juridical character of acts of war? . . . Acts committed in the execution of a war are assaults on persons and goods which are themselves prohibited, but are sanctioned in all legislations. The state of war could make them legitimate only if the war itself was legitimate. Inasmuch as this is no longer the case, since the Kellogg-Briand Pact, these acts become purely and simply common law crimes. . . . Any recourse to war is a recourse to means which are in themselves criminal'. (pp. 350–351.) There is some measure of false logic here, however, for it does not follow that because a particular action is illegal, it is also criminal; thus a general restraint of trade has constantly been held to be illegal, but it has not therefore been held to be criminal, for, as Kenny points out, crimes are

' wrongs whose sanction is punitive ', and there is no sanction postulated in the Pact of Paris.

These volumes also include the evidence connected with War Crimes and Crimes against Humanity and in Part 4, p. 369, the attempt is made to prove that Article 6 of the Tribunal's Charter introduced no innovations into the conception of crimes, even in the international sphere. The evidence given by witnesses who passed through the various concentration camps of conditions in those camps makes nauseating reading, and it is often difficult to believe that human beings could have sunk so low, especially when reading the accounts of experiments on human beings (see, *e.g.*, Part 5, pp. 182–280; Part 7, pp. 70–73; Part 8, pp. 7–21). It is difficult to realise that military and civilian prisoners suffered such treatment and lived to give evidence at Nuremberg.

The proceedings under review also deal with the case against the indicted organisations; the aggression in the East and the methods of terror employed against Slav and, particularly, Russian personnel; the murder of 50 R.A.F. officers from *Stalag Luft III*; and the conclusion of the Prosecution case. Part 8 concludes in the middle of the evidence for the defence of Goering and reproduces the testimony of General of the Luftwaffe Karl von Bodenschatz and the incomplete evidence of Field-Marshal of the Luftwaffe Erhard Milch, whose memory always appeared deficient concerning any matter which might have incriminated Goering.

When this series of reports has been completed they will constitute a very valuable source of documents and statements connected with the rise and fall of Hitler's *Reich*, and in conjunction with the series of Law Reports of Trials of War Criminals now being published by H.M.S.O. will provide material for a detailed and comprehensive study of war crimes in all their aspects during the recent war. From the point of view of the general public it would be valuable if selected pieces of the evidence could be published separately in small and readable pamphlets, for the recent *Penguin* by Cooper only deals with the trial itself, while what is needed are photographs to bring home to the public that in modern total wars law tends to give way to necessity, and necessity knows no limitation. War today has reverted to the old pre-humanist conception of extermination, in the process of which any method, however horrible, is to be expected and even enjoined.

L. C. GREEN.

Law Reports of Trials of War Criminals. Vol. I. Selected and prepared by the United Nations War Crimes Commission. (London: H.M.S.O. 1947. xi and 127 pp. 2s. 6d.)

This volume is the first of the series of reports of trials of those persons described by the Moscow Declaration of October 30, 1943, as ' minor war criminals ', but, as Lord Wright points out in his Foreword, ' this is a misleading term because of the enormity and scope of the crimes committed, which really include all war crimes except those that were charged at the Nuremberg and Tokyo trials and are described as crimes which have no particular geographical location '.

Nine cases are reported here, three of which were tried by United States, and six by British Military Commissions. In one instance Greek, and in another Dutch officers sat with the British. Only one trial is concerned with Japanese war criminals, the others were all German. The accused included both military personnel and civilians, and the offences charged included the killing of survivors of a sunken ship, the shooting of unarmed prisoners, the killing of civilians by injections, the scuttling of U-boats in violation of the Instrument of Surrender, etc.

An interesting thing about these cases is that they all took place before the Nuremberg Tribunal issued its Judgment, nevertheless, in each case in which superior orders were pleaded as a defence the plea was overruled. An illuminating quotation in this connection was used by the British prosecutor in the *Almelo Trial*. He referred to a statement by Dr. Goebbels, reported in the German press on May 28, 1944, that ' no international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established international usage of warfare ' (p. 40). It is, therefore, interesting to read reports of cases in which German counsel denied the rightness and applicability of the decision of the German Supreme Court in the *Llandovery Castle*, while British prosecutors and Judge Advocates supported it. The tribunals also rejected pleas based on a lack of *mens rea* and on the maxim *nulla pœna sine lege*. As regards the latter, the Judge Advocate in the *Peleus Trial* pointed out that ' *nulla pœna sine lege* . . . referred only to the municipal or domestic law of a particular State and the court should not be embarrassed by it in its deliberations ' (p. 12).

The method of reporting enables one to follow the arguments of both prosecution and defence, and so we learn, *per* Professor

Wegner, defence counsel in the *Peleus Trial*, that Nazi jurisprudence taught that ' there existed no universal truth and law, . . . instead the will and the command of the nation had the supreme, absolute and totalitarian value, claiming an individual's whole and undivided loyalty ' (p. 8). We are also able to discover the reasons that led to the decision in the British cases, for there is a report of the advice given to the court by the Judge Advocate; since the Judge Advocate is the prosecutor in American cases, the reasons for the decisions in such cases can only be surmised from a study of the arguments used by the defence and the prosecution.

Just as valuable as the actual reports are the notes on the cases compiled by the Secretariat of the United Nations War Crimes Commission. These remind us that the British *Manual of Military Law* and the American *Basic Field Manual* are not legislative instruments, but only informative documents that may be departed from when ' inconsistent with the views of most writers on the subject '. They attempt to gather the various points of law dealt with in the cases here reported, and, as a result of the decisions in the *Hadamar Trial* and the *Zykon B Case*, are able to draw attention to the fact that ' the provisions of the laws and customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes, . . . and any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal ' (pp. 54, 103).

The grounds upon which the Secretariat bases the jurisdiction of British and American tribunals dealing with war criminals will provide food for thought to those concerned with the problem of German sovereignty today. Such tribunals may try cases in which the victims possess their own nationality or that of allies ' engaged in a common struggle against common enemies '. Jurisdiction rests also on ' the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has an International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed ' (p. 103). In addition, we learn that ' the jurisdiction of the British court, sitting in the British Zone, could also be based on the fact that after the *debellatio* of Germany, the Allied Powers have been the local sovereigns in Germany ' (p. 13).

Valuable comments are also made on the difference between the British and the American tribunals and the instruments creating them, the rules of evidence and procedure applied, the connection with municipal courts, and the like. As future

volumes will include the decisions of tribunals of other allied powers, the series should enable a comprehensive and comparative study of war crimes and their punishment.

L. C. Green.

Leviathan. By Thomas Hobbes. Edited with an introduction by Michael Oakeshott. (Oxford: Basil Blackwell. 1946. 8s. 6d. net.)

This is the third in a series of political classics re-edited with introductions by distinguished modern scholars. Mill on *Liberty* and Locke on *Civil Government* are followed by Hobbes' *Leviathan*. The idea of such a series is felicitous, and its execution important. We can produce little in the way of fundamentally new political ideas. The great ideas and antitheses of politics (and law) have been put forward, during the last two-and-a-half thousand years, by a small number of giants. They have been varied, rephrased and commented on by a host of smaller men. Our main task is to see clearly the fundamental antinomies and to reassess the great writers and their systems in the light of present social conditions.

Of the continued, or, possibly, increased topicality and importance of Hobbes' work there can be no doubt at all. His main and lasting contribution to jurisprudence has been not so much his dubious though influential doctrine of social contract as the firm recognition of the interrelation of force and law. The Austinian doctrine of sovereignty and the whole philosophy of legal positivism are built on it, but the continuous strengthening of state authority has made many forget its essential foundations. The question has, however, been reopened through the present dilemma of international law and the issue before international society.

Mr. Oakeshott, in a thoughtful and suggestive introduction, not only gives an illuminating analysis of Hobbes' system, he also traces the philosophy underlying Hobbes' writings: 'For Hobbes, to think philosophically, is to reason; philosophy is reasoning. . . . But to understand more exactly what he means by this identification of philosophy with reasoning, we must consider three contrasts that run through all his writing; the contrast between philosophy and theology (reason and faith), between philosophy and "science" (reason and empiricism) and between philosophy and experience (reason and sense)'. These contrasts and their bearing on the general development of philosophical thinking are developed by the learned editor.

Mr. Oakeshott starts with a general classification of his own which is stimulating but would certainly need much fuller

exposition. According to him, there are three main patterns of philosophical thinking about politics. The first is distinguished by reason and nature (Plato's *Republic*); the second by will and artifice (Hobbes' *Leviathan*); the third—in the belief of its followers, who obviously include the editor—combining the truths of the first two and avoiding their fallacies—by the rational will (Hegel's *Philosophy of Law*). As far as the last of these traditions is concerned, the present reviewer would most strongly challenge the alleged happy combination of will and reason in Hegel. As he has attempted to show elsewhere (*Legal Theory*) Hegel has, through a system in which will masquerades as reason, deluded a whole trend in philosophical and political thinking into believing that the antinomies of values and systems do not exist. The consequences have been fateful to philosophy and catastrophic to politics. This, however, would need fuller statement as much as the learned editor's thesis.

It may well be hoped that this excellent new series will give a stimulus to the intelligent study of the great political classics.

W. FRIEDMANN.

SCIENTIFIC MAN *v.* POWER POLITICS. By HANS J. MORGENTHAU. (University of Chicago Press, Chicago. 1946. x and 245 pp. 16s. 6d.)

PROFESSOR Morgenthau informs us in his preface that 'It is the purpose of this book to show why belief in the redeeming powers of science is misplaced, to point to the elements in philosophic and political thought from which this belief has arisen and in which it manifests itself, and, finally, to indicate those intellectual and moral faculties of man to which alone the problems of the social world will yield' (vi). With this aim in view, he discusses the development of political thought through rationalism to science, a development which he finds contemporaneous with the rise of political liberalism.

In the course of his discussion the author deals with some of the fallacies inherent in the liberal approach to international affairs. Thus, he points out that foreign policy and the decision of war or peace are determined not by the political complexion of domestic policy, but by 'geography, national character, tradition, and the actual distribution of power, factors which no government is able to control but which it can neglect only at the risk of failure' (p. 66). Further, he deals with those politicians and political theorists who believe that all that is needed to secure lasting peace is the establishment of the rule of law, and emphasises that it is 'the peace reigning in the minds of men' which makes possible 'the reign

of the rule of law ' and not *vice versa*, for ' what we call " order under law " is not the creation of law but of social forces which make for both order and law ' (pp. 116–117). Since rationalism eschews power and violence he attempts to show the true function of morality in international affairs, pointing out that ' In a world where power counts, no nation pursuing a rational policy has a choice between renouncing and wanting power. . . . (The) sham battle against power politics, however, gives our civilization at least the satisfaction of having paid tribute to its ethical standards and of being able to continue to live as though those standards did not exist ' (p. 200).

After the conclusion of a hard-fought war it is usual for the victors to adopt an attitude that suggests that the victory has been due not so much to their possession of superior military might, as to their possession of all the virtues. It is refreshing, therefore, to find an American professor reminding us that ' The monopoly of the atomic bomb may coincide with a monopoly in virtue; but no necessity makes the latter an attribute of the former ' (p. 6).

The basic thesis of *Scientific Man* v. *Power Politics* is to be found in scientific man's approach to politics. In his search for facts and rationalism he ignores those interests, emotions and sentiments that contribute so much to the dynamic character of international affairs in a power-ridden world. This can be seen, for example, in the decision of Great Britain to seek the appointment by the General Assembly of a fact-finding commission for Palestine, when too many facts are already readily accessible, while there is not enough awareness of the conflicting Anglo-Arab-Jewish interests. Social problems—like that of peace or war—differ fundamentally from scientific problems which are solved finally once and for all. The former are recurrent and require solving anew each time they arise, for there is no universal panacea. Instead, ' when all problems between individual countries, which might otherwise lead to war at a particular time, are solved peacefully with the particular methods appropriate to them, then universal peace is preserved at this particular moment in history. New problems will arise, again threatening peace and requiring similar solutions, and if these solutions are forthcoming, peace will again be preserved ' (p. 217).

Professor Morgenthau has provided an interesting study of the failure of scientific man in his struggle to overcome power politics. It is to be hoped that one day he will provide us with an equally stimulating work illustrating how that struggle can be brought to a successful conclusion.

L. C. Green.

ESSAYS ON THE CONFLICT OF LAWS. By JOHN DELATRE FALCONBRIDGE, M.A., LL.B., K.C., Dean of the Osgoode Hall Law School. (Toronto: Canada Law Book Company, Ltd. 1947. xxxi and 730 pp. Price $8.)

DEAN Falconbridge has long been known as one of the most prolific writers and as one of the most acute minds on the Conflict of Laws that the English-speaking world has produced. Many of his outstanding contributions to this branch of the law have appeared in the *Law Quarterly Review*, though generally, and naturally, the *Canadian Bar Review* has derived the greatest benefit from the output of his pen. Articles and notes on cases have been so numerous during the last fifteen years or so that, in effect, there is hardly a branch of private international law which has not been enlightened and enlivened by Dean Falconbridge's observations. But these were dispersed and not always readily accessible. It is therefore a matter of great gratification that he has published a book which, in his own words, 'includes, but is something more than, a collection of articles and case comments published from time to time'.

On the whole the book is a collection of essays, and the reader will find in it a great deal of material with which he is, or ought to be, well conversant. Yet it is certainly much more than the usual collection of previously published essays. This is so for two reasons. In the first place many chapters are entirely new. This applies to the introductory chapters (Domestic Rules and Conflict Rules; The Meaning of a Conflict Rule) and to other portions of the book, particularly the valuable chapters 'International and Intranational Cases' and 'Substance and Procedure'; moreover, in many cases revisions, additions or omissions involve alterations of the previously published text. Secondly, however, this is almost a textbook. It is not written in the form of a textbook and the author says little if anything about domicil, nationality, immunity from jurisdiction, bankruptcy, public policy or a few other topics which a textbook would include. But this is of small importance in view of the fact that the author has covered almost the whole field of the problems which one would expect to find discussed in a textbook. The introductory chapters mentioned above are followed by five chapters devoted to what the author calls characterisation (pp. 35 to 108) and by a long discussion of renvoi and its divers implications (pp. 109 to 222)—chapters which mainly reproduce the articles published in 1930, 1931, and 1937 in the *Law Quarterly Review*. Chapter 12 on Limitation of Actions and Prescription, based on an article in (1943) 21 Canadian Bar Review 669, opens a long series of chapters which deal with more specific questions and of which the

following are the most substantial and representative: Bills and Notes: Herein of Contracts (to a large extent identical with pp. 860 to 917 of the author's book on Banking and Bills of Exchange, 5th edition, 1935); Contract and Conveyance: Personal Chattels (derived from an article in (1934) 2 Dominion L.R. 1); Administration and Succession (originally published (1942) 20 Canadian Bar Review 10); Marriage, Divorce and Annulment (see the article in (1932) 4 Dominion L.R. 1). The whole work consists of forty-six chapters and it is a remarkable tribute to the monographic work of the author that he has been able to complete it without resorting to all his previous publications.

Dean Falconbridge has not by any means confined himself to a reproduction of his earlier writings. Although he has not taken account of all material that has appeared since the date of the earlier publication (M. Wolff's book has been ignored entirely); although Continental publications are referred to only sporadically; although the emphasis frequently is on Canadian cases and some more recent English cases have been overlooked (*e.g.*, on p. 266 the decision of the House of Lords in *Hickman* v. *Peacey*, [1945] A.C. 304; on pp. 309, 334, 342 *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122 and *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224; on p. 322 *Vionnet & Cie* v. *Wills*, [1940] 1 K.B. 72; on pp. 421 sqq. *Finska Angfartys A/B* v. *Baring Bros. & Co., Ltd.* (1937), 54 T.L.R. 147, 1031); although altogether the author uses his material a little eclectically, he has throughout revised his essays, brought them up to date, to some extent re-arranged them and in many cases added postscripts.

The expert, however, will not turn to this book for its collection of material, but for stimulating discussion of the highest quality. Dean Falconbridge, being a real master of his subject, is never content with mere exposition nor is he attracted by theorising or unproductive speculation. His interest lies in analysis. This, and his faculty for restrained and reasoned criticism, for probing to the kernel of problems, for elucidating them by a happy formulation, for a fairly conservative approach, make his work an outstanding contribution to a branch of the law which in all countries has by now been more enriched by scholarly treatment than any other.

F. A. Mann.

Précis de Droit International Privé. By P. Arminjon. Volume I: Les Notions Fondamentales du Droit International Privé. 3rd edition. (Paris. 1947. 461 pp.)

Professor Arminjon's treatise has long been known as one of the most important modern contributions to the development of French private international law. Its great merit was and is that it constitutes a breach with the deductive method practised by so many Continental scholars, particularly in France. As the learned author states with justification in the Preface to the third edition, his work propounded ideas '*qui semblèrent paradoxales et qui sont en train de devenir banales*'. Today even in France '*la méthode analytique et positive*' for which Professor Arminjon is largely responsible, is beginning to become well established.

In the third edition Professor Arminjon has again elaborated and refined his method of approach, but he has also greatly extended his work which in future will consist of three volumes. Many important chapters have been added and, generally, the work has been revised and brought up to date. The small circle of English lawyers interested in the theory of French private international law will be very grateful for the publication of this new edition. Yet it cannot be gainsaid that from the English lawyer's point of view this book, or at any rate its first volume dealing with the general principles, fulfils limited functions only. It contains a great deal of theoretical discussion, it refers also to a good many French and other decisions, but it does not allay those uncomfortable feelings which so many French books inspire and which make an English reader continuously wonder whether the writer has attached sufficient weight to the reality of the law, the practice of the courts. It would be a matter of great satisfaction if, in his succeeding volumes, Professor Arminjon stated and explained French practice with as much care and devotion as he bestows on French and other doctrine in the first volume of his work.

F. A. Mann.

Inventions, Patents and Monopoly. By Peter Meinhardt. Foreword by James Mould. (London: Stevens & Sons. 1947. 334 pp. 25s.)

It is a considerable achievement to cover so wide a field as this book within the compass of some 300 pages, and yet produce a book which is not only informative but which can be read with enjoyment. This book, as Mr. Mould has said in the preface, does not fall into either of the two usual

categories of books on patents; that is text-books for legal practitioners who specialise in this branch of the law, or books written for the information of the general public. For that reason this book should appeal to a very wide public, including both those engaged in patent work as well as industrialists, economists and scientists.

From a literary point of view the style is somewhat uneven owing to the juxtaposition of legal or economic analyses with illustrative but rather journalistic anecdotes. Any superficiality that might arise from the compression of such a vast subject within a short book, is compensated by the extremely valuable bibliographical footnotes.

Mr. Meinhardt's views on monopolies and the reforms of the patent law and practice he suggests are all interesting; and if one does not agree with all his suggestions (which on a matter so highly controversial, the author himself does not expect), it is stimulating to read his views on all branches of this subject.

The book is divided into four parts: Part one dealing Inventors and Inventions; Part two with British Patent Law and Practice; Part three with the Abuse of Patent Monopoly, and Part four with suggestions for Patent Law Reform. It has a long and useful bibliography and is adequately indexed.

Irene G. R. Moses.

Awards to Inventors. By J. P. Graham, b.a., Barrister-at-Law. (London: Sweet & Maxwell, Ltd. 171 and x pp. 21s. net.)

The author has set himself the difficult task of trying to predict the principles which will guide the Royal Commission on Awards to Inventors appointed by Royal Warrant on May 17, 1946, before this Commission started its work in February 1947. He assumes on page 4 that the 1946 Commission will draw very largely on the experience of a similar Royal Commission appointed in 1919 and adopt the general principles enunciated by the 1919 Commission. The author admits that the 1946 Commission is in no way bound by the principles adopted by the 1919 Commission. It is too early to say whether the prophesy of the author, that the 1946 Commission will in fact be guided by the principles enunciated by the 1919 Commission, will prove to be correct or false.

Circumstances under which inventions were made, communicated to the Crown and used for war purposes by the armed forces, the supply departments and Government contractors in the course of the 1939–1945 War were in many respects different

from those prevailing during the 1914–1918 War. This is clearly put by the President of the Board of Trade, Sir Stafford Cripps, K.C., in a Foreword to Mr. Graham's book, where he says that in the Second World War ' not only was the range of wartime inventions greatly extended, but owing to the almost complete pooling of the results and their rapid development under Government auspices it became increasingly difficult to trace their origins '.

Under Continental practice opinions as to the proper decision of moot points of law expressed in books or commentaries written by distinguished lawyers are given considerable weight by courts and tribunals and may be quoted freely in pleadings and at hearings. Under English practice, however, opinions expressed in books written by living authors cannot be quoted to a court or tribunal. Therefore, while Mr. Graham's book is the only work written on the intricate subject of Awards to Inventors, it will not be permissible to quote before the Commission the opinions expressed therein.

Subject to the above, Mr. Graham's book should prove very useful to all inventors whose inventions were used by the Government during the war, and to their legal advisers. Of particular interest are his comments on sections 29 and 58A of the Patents and Designs Act, 1946, regulating the use of patented inventions and registered designs by the Crown and its agents. Similarly useful is his analysis of the principles adopted in assessing awards by the 1919 Commission. These principles are dispersed in the seven reports published by the 1919 Commission during the period 1921 to 1937 and a compilation published by the Treasury Solicitor in 1929 and reprinted in 1946; they are, for the first time, systematically arranged and discussed in Mr. Graham's book.

The author deals with the interesting problem as to when the right of compensation against the Crown can first be asserted (p. 11). Under section 10 of the Patents Act damages against private persons or firms can be claimed only for the period commencing with the acceptance of the complete specification. Mr. Graham rightly suggests that compensation against the Crown should be given by the Commission also for use before acceptance; this is specially important for the many inventors whose patent applications were ' frozen ' during the war under the Defence Regulations, so that acceptance was delayed often for several years.

Mr. Graham's suggestion (p. 14) that compensation should be awarded not only to inventors and patentees but also to exclusive licensees also appears equitable.

On page 27 the author discusses the nomination by the Treasury of defendants for the purposes of test actions against the Crown under section 29 of the Patents Act. This

procedure, desirable as it may be, will have become considerably more difficult since the decision of the House of Lords in *Adams* v. *Naylor*, [1946] All E. R., Vol. II, p. 241.

On page 44 Mr. Graham says that ' in a patent suit in the courts the onus lies upon the plaintiff to establish the validity of his patent and infringement by the defendant, and in the same way in a claim against the Crown under section 29 the claimant has to establish both the validity of the patent and user by the Crown '. Certainly the onus of proving infringement or user is on the plaintiff or claimant. However, in patent actions in the courts between ordinary subjects the onus of proving invalidity is on the defendant; on this involved problem see *Terrell on Patents* (8th ed.), p. 425–426. There is a dictum in *Rowland & Kennedy* v. *The Air Council* (1927), 44 R.P.C. 458, that in proceedings against the Crown the onus of proving validity is on the claimant, but this dictum is considered erroneous.

On pages 52 and 151 the author mentions the preliminary examination by an investigating committee of claims for ex gratia awards for unpatented inventions under Head 3. This investigating committee consists of the chairman (or sometimes another member) and the secretary. The investigating committee of the 1919 Commission examined 1,465 cases and the task facing the investigating committee of the 1946 Commission may be even heavier.

The question of taxation of awards is mentioned casually by Mr. Graham on pages 38 and 146, but he does not effectively deal with this problem which is vital to every inventor making a claim to the Commission. It is thought that ex gratia awards under Head 3 are free of tax, while awards for the use of patents under Head 1 are subject to income tax, surtax and E. P. T. A patentee may therefore sometimes be well advised to waive his rights under the patent under Head 1 and seek an ex gratia award under Head 3. The author's remarks and quotations on pages 50, 58 and 146 on the possibility of alternative claims under Head 1 or Head 3 will be helpful to the inventor or his legal adviser once the tax position has been clarified.

In the appendices the author has collected in a very convenient form the several Acts, Regulations, Royal Warrants, International Agreements, Commission Reports and Procedure Rules relating to claims by inventors or patentees whose inventions have been used for the purpose of winning the war.

Peter Meinhardt.

A MANUAL OF AMERICAN COPYRIGHT PRACTICE. By MARGARET NICHOLSON. (London: Geoffrey Cumberlege, Oxford University Press. 1946. 255 and x pp. 16s. net.)

THE author of this work, which bears the notice, 'Copyright, 1945, by Margaret Nicholson', has accomplished the rare feat of writing a readable reference book. According to the preface, the book is intended for the author, editor, publisher, etc., for anyone in the literary world who wants to know what to do in a specific situation involving American copyright, and is not meant for the copyright lawyer. Yet an English lawyer who is looking for a general survey of American copyright law, or wants to compare a specific point of British copyright law with the corresponding U. S. rule could find no better handbook.

Part I deals generally with the background of the copyright law, the U. S. Copyright Office which forms part of the Library of Congress, the subject-matter of copyright, the method of protecting American copyright, etc. Part II contains, in alphabetical order, short sections on most points of American copyright practice, such as applications, assignments, deposit of copies, fees, infringement (but not the legal remedies against infringers), moral rights, copyright notices, radio rights, and many others. Part III contains questions and answers on copyright problems arising in the daily work of publishing-houses, as well as forms to be filed with the U. S. Copyright Office. The appendix contains the text of the U. S. Copyright Act of 1909 and an ample subject index.

Of particular interest to the English reader are the numerous comparisons between American and English law, the explanation of the steps an English author has to take if he wishes to protect his copyright in the U. S. A., and the steps a U. S. author must take if he desires to protect his copyright in the United Kingdom.

Miss Nicholson explains (p. 101) that American authors usually fare better under British law in Great Britain than they do at home, or than British subjects fare in the U. S. A. She admits (p. 155) that the British system requiring no renewal is more advantageous to the author than the U. S. system with its formal renewal requirements. She regrets (p. 106) that the U. S.—in company with Russia and China—is one of the few leading countries of the world which do not belong to the International Copyright Union.

The concept of American copyright protection, as laid down in the U. S. Act of 1909, is fundamentally different from the concept of the British Act of 1911. The U. S. still follows the registration system, inaugurated by the English Act of Anne of 1709. Great Britain, on the other hand, together with all

countries of the International Union, follows the pure system of first publication.

Miss Nicholson stresses repeatedly that it is necessary, in order to secure and maintain American copyright for a book, to publish it in the U. S. with a proper copyright notice, to register it with the Copyright Office, to deposit copies with the Copyright Office, and after twenty-eight years to renew the copyright. In addition, in the case of a book in the English language, the work must be completely manufactured within the limit of the United States. Miss Nicholson explains (p. 118) that the original purpose of this requirement was to protect the standard of living of the American worker against cheap foreign labour. To-day, however, the provision works to the disadvantage of the American author, since it is the chief obstacle to the U. S. joining the International Copyright Union and thus securing for books published in the U. S. copyright protection in Union countries without separate simultaneous publication in the Union (p. 106).

Reference is made on pages 104 and 179 to the British-U. S. Copyright Agreements, but the British Order in Council of February 3, 1915, which is the basis of copyright protection for U. S. citizens in Great Britain, and the wartime extension Order in Council of August 6, 1942, are not mentioned.

In the section on ' Ad Interim Copyright ' (p. 33), advice is given on the method by which a British author of a book in the English language can secure, by registration and deposit within sixty days from the British publication date, ad interim American copyright for four months, pending the manufacture (typesetting, printing and binding) of a U. S. edition. Under U. S. wartime regulations this time limit is temporarily waived (p. 167).

A British author, whose work has not got a sufficient number of readers in the U. S. to warrant a separate American edition to be completely manufactured in the U. S., has no legal protection under the U. S. Copyright Act. However, no reputable American publisher will steal his property. Miss Nicholson explains (pp. 99 and 121) that an American author or publisher who wishes to publish, reprint or quote from a foreign publication unprotected in the U. S. but protected in its country of origin, is morally bound to get permission from the original owner of the copyright, and usually pays him at least a ' courtesy fee '.

In the sections on duration and renewals (pp. 84, 153, 179) Miss Nicholson states that the American copyright is limited to a maximum of fifty-six years, while British copyright endures for fifty years beyond the death of the author. Moreover, American copyright needs renewal after twenty-eight years, while no renewal is required under British law. Miss

Nicholson remarks (p. 155) that under the British system the author has no opportunity to remedy an earlier error of a bad bargain with a publisher; in this she overlooks the proviso to section 5 (2) of the British Copyright Act, according to which, with few exceptions, no assignment and no grant of any interest in a copyright shall be operative beyond twenty-five years. No reference is made in Miss Nicholson's book to the important provisions in sections 3 and 4 of the British Copyright Act relating to compulsory licences.

American books are a luxury which a British lawyer nowadays can procure only with difficulty. Gratitude is therefore due not only to Miss Nicholson for her clear and concise manual on the American copyright law, but also to Mr. Geoffrey Cumberlege for publishing this well-printed and bound volume in this country at such a reasonable price.

PETER MEINHARDT.

THE DOUBLE TAXATION CONVENTIONS. Volume I: TAXATION OF INCOME. By F. E. KOCH. (London: Stevens & Sons, Ltd. 1947. xxiv and 441 pp. Price 45s.)

FOR about twenty-five years or so the problems of double taxation have provoked a great deal of international discussion (see the material collected by Oppenheim-Lauterpacht, *International Law*, 6th edition, I, p. 620) but with little practical effect. The Conventions concluded between the United States of America and this country on April 16, 1945, and soon followed by similar treaties, represent an important point in the development of this branch of the law. Mr. Koch is to be congratulated on his timely and courageous decision to write a commentary upon the Conventions to which this country is a party. While the second volume of his work, devoted to the taxation of estates, will, it is hoped, be available in the near future, the first volume, dealing with the taxation of income, has now been published.

In the five opening chapters of 24 pages, Mr. Koch discusses the more general aspects of double taxation law. The sixth chapter, which is the longest and most important of all, contains a commentary upon the provisions of the Convention with the United States. The following chapters contain the texts and some explanations of the Conventions with Canada, Southern Rhodesia, South Africa, Australia and France, though the author's comments are much less elaborate than those relating to the Convention with the United States. In the Appendices the reader will find once more the texts of the six Conventions (this time annexed to the respective Statutory Rules and

Orders by which they are incorporated into the law of England and which, therefore, ought to have been taken as the basis of discussion—a method which would have resulted in saving of paper and reduction of price) and also some other material which is not readily accessible to the practitioner and will prove very helpful.

Double Taxation Conventions involve difficult problems of international law, because they have to cope with legal conceptions the meaning of which differs from country to country. The recent Conventions define some of the more important terms and also include an escape clause whereby ' any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party ' whose tax legislation is being applied. When liability in England is in issue, the term ' resident ', which is not defined in the Convention with the United States, will, therefore, be governed by English law, but it is presumably for American law to say whether salary in respect of services to the United States in the discharge of governmental functions is ' paid by the Government of the United States ' so as to be exempt from United Kingdom tax under Article X. Other problems of construction arise from the definitions themselves; thus a United States Corporation means ' a corporation, association or other like entity created or organised in or under the laws of the United States ', but a United Kingdom corporation means ' any kind of juridical person created under the laws of the United Kingdom '. One wonders what is behind this difference in definition.

Mr. Koch approaches his subject from the point of view of the tax expert rather than from that of the international lawyer. His technique is to summarise the material provisions of the tax law of the United States and England and to indicate the changes which the Convention has effected. Although he describes himself as an accountant, he has a considerable amount of legal training and experience. For although only a tax expert of equal rank could venture to pass judgment on the author's statement of the law, it seems that he has a full command of his material and uses it with discretion, precision and insight. His references to the American practice will prove particularly valuable. Altogether this is a very useful book which the practitioner will come to regard as a reliable guide through a complicated branch of the law and which justifies the assurance that, when writing his second volume, Mr. Koch will be accompanied by the good wishes of the profession.

F. A. Mann.

THE PRINCIPLES OF COMPANY LAW. By J. CHARLESWORTH, LL.D. Fourth Edition. (London: Stevens. 1945. xxxlx and 261 pp. 10s. 6d. net.)

PALMER'S COMPANY GUIDE. Thirty-fifth Edition. By J. CHARLESWORTH, LL.D. (London: Stevens. 1946. 266 pp. 5s. net.)

THESE two little books need no introduction; the fact that the former has gone into four editions since 1932 and that the latter is now a veteran of thirty-five editions is sufficient evidence that they meet a need. The *Principles* is an elementary students' book while the *Guide* is a 'Shareholders', Directors', and Voluntary Liquidators' Legal Companion' (to give it its former title).

In his Preface to the *Principles* Dr. Charlesworth explains that emergency legislation has been referred to as little as possible, 'in the belief and hope that it is merely of a temporary character'. In a students' book this is no doubt justifiable, even although the hope expressed is perhaps over sanguine, but unfortunately the same principle has been adopted in the *Guide* which decreases its value as a practical handbook for the present day. Again, the recommendations of the Cohen Committee are not dealt with, which seems unfortunate since, although these have as yet no legal sanction, they are in many respects being adopted by practitioners as representing the best practice. Moreover, reference to these recommendations in the *Principles* would have made the book more interesting, which is a vital consideration in a students' text-book. It is a pity, too, that Dr. Charlesworth could not have found space in this book to explain, however briefly, the nature of Unit Trusts which represent a modern development of some commercial importance and considerable juridical interest. They are mentioned by name on p. 44 in connection with the Prevention of Fraud Act, 1939, but no explanation of them is given, and one wonders how many students will have any idea of what they are.

These, however, are merely suggestions on which opinions may differ. There can be no difference of opinion on the fact that the new editions should maintain the popularity which both books enjoy.

L. C. B. GOWER.

JACKSON & GOSSET'S INVESTIGATION OF TITLE. By EDMOND H. BODKIN, B.A., of Lincoln's Inn, Barrister-at-Law. Fifth edition. (London: Stevens & Sons, Ltd. 1946. lxxii and 445 pp. £2 2s.)

THE law libraries contain certain books which have attained such a status that the mere mention of their authors recalls the

volumes by which their names are primarily associated in the realm of legal literature. Furthermore, there are some books which are consulted as much for their 'Notes' or 'Dissertations' as for the body of the text prima facie constituting their raison d'être. Of such a work, Jackson and Gosset on *Investigation of Title* is an outstanding instance. The first edition by Mr. W. Howland Jackson and Mr. Thorold Gosset, Barristers-at-Law, was published in 1898 and was hailed by conveyancers of both branches of the profession as supplying a long-felt want by providing under alphabetical grouping a comprehensive set of Requisitions on Title, in respect of which hitherto no single work afforded so wide a range of precedents.

Prefaced to these sets of requisitions were succinct statements of the relevant Law, well documented by citation of the statutory and judicial authorities, and furnishing a portable compendium of the substantive Law of Property in relation to conveyancing practice. An introductory note on the methods of analysis of title expressed in a set of 'rules' and reminders as to requisitions and inquiries was supplemented by Appendices of Common Form and Miscellaneous Requisitions, Specimen Abstract of Title with Analysis and Notes thereon, as well as a model Opinion and Requisitions, and Answers thereto, with Further Opinion and Requisitions, and some additional Precedents of practical utility, together with a most convenient excursus on Costs. The present editor, Mr. Edmond H. Bodkin, has faithfully followed the main lines of the original authors, adding a helpful set of Precedents of Summons under section 45 of the L. P. A. 1925. To meet the immediate needs of practitioners upon the coming into operation of the Property Legislation of 1925 a supplement to the Fourth edition of 1922 was produced by Mr. Gosset, one of the joint authors of the original work, under the style of *Modern Investigation of Title*, a work which proved to be most helpful in the early days of the then new statutes.

But the present edition is the first complete recension of the whole book and must have involved considerable labour in production, for it required not only a scrutiny of the case law since the supplement but also of a large amount of legislation since 1925 which, not directly connected with the associated statutes of that year, have a distinct bearing upon the practice of conveyancing.

As a vade mecum of the substantive Law of Property, the present writer can afford testimony to its utility and general accuracy, always having in mind that compressed statements of the law must be regarded as reminders of and not substitutes for the original sources. One is inclined, however, to feel that the balance between the statements of law and the Precedents of Requisitions have been tilted rather too

generously in favour of the former, so that we have for instance pp. 295 to just over 316 devoted to the Law of Settled Land (and an admirable statement thereof, without doubt) and not quite the whole of p. 317 for the relative Requisitions. No collection of Precedents of forms of any kind has ever attained, and, one ventures to predict, is ever likely to be able to attain, such completeness that every possible contingency can be provided for. But the eight Precedents as to Settled Land hardly seem to extend to that wide range of instances for which the subject calls and the draftsman looks as a guide to the requirements of practice, and that is by no means the only subject in respect of which a larger number of Precedents would have been welcome and the practitioner stands in need. Again, a reversion to the contrasted types of the earlier editions would be desirable in a future issue. Formerly the Precedents were easily found by reason of the different type in which they were printed from that of the statements of the law. In the present edition everything in the body of the work is in the same type, and in practice this is not as convenient as the former method.

Would it not be possible in future editions to give the full names of the original authors and on p. iv to name those responsible for each edition? This is done in several works and is not only helpful from a bibliographical standpoint but fair and just to the writers of earlier days.

Editor and Publishers are to be congratulated upon successfully answering one of the most urgent ' Requisitions ' of recent years—and that is a new edition of what after all is the leading work upon Requisitions themselves.

Having regard to *Jones* v. *Hulton*, [1910] A.C. 20, it would seem to be better to use the letters of the alphabet to designate parties and places than to describe them with fancy names as in the model Abstract in Appendix B where the choice of the original authors could not be described as commendable.

Bertram B. Benas.

The Indian Digest, 1931–1946. By V. V. Chitaley and S. Appu Rao. (All-India Reporter, Ltd. 1946. Vols. I and II. 2406 pp. Rs.10 each.)

The All-India Reporter Manual of Unrepealed Central Acts. By the same authors and publishers. (1946. Vols. I and II. 2199 pp. Rs.12 each.)

The Indian Stamp Act (II of 1899) with a commentary by the same authors and publishers. (1946. 1175 pp. Rs.16.)

Case law is important in British India as the doctrine of judicial precedent is part of Anglo-Indian jurisprudence. But the case law is so prolific that unless there is something like the present Digest, it will become altogether unmanageable. Literally hundreds of new cases are decided each year by the several High Courts, and as all these High Courts have equal authority, their decisions are very often contradictory, until the Privy Council is petitioned to solve the conflict. Relatively few such cases come to the Privy Council for settlement and the need to co-ordinate such cases by arranging them together by reference to their principles in a Digest is therefore the more urgent. And this is what the authors have set out to do. But they have found it practicable only to digest cases from 1931 onwards. In this first two volumes of the Digest are arranged subjects alphabetically from 'Abadi' to 'Civil Procedure Code', 1908, First Schedule, O. 34, and the present law as enunciated in judicial decisions is given. Extracts from the judgments are often quoted. The names and references of the cases are fully given. This work should prove extremely useful to every lawyer dealing with Indian law.

Equally useful to practitioners is the Manual of unrepealed Central Acts. Its object is to make available to the Bench and Bar practically the entire statute law passed by the Indian Central Legislature. The unrepealed Central Acts are arranged in alphabetical order of their titles, together with respective amendments by both Central and Provincial Legislatures. The authors have gone further than merely arrange Acts in their order, by prefacing most of the Acts with a statement of objects and reasons and even where necessary commenting on some of the important sections. The first two volumes take us as far as the Court of Chancery Act, 1851. All those who need to know what the Indian statute law is can find it here without much effort.

The last volume of the authors relating to Indian stamp law is an exhaustive commentary on the Indian Stamp Act (II of 1899). In this volume is included almost every item relating to stamp law. The actual text of the Stamp Act with its commentary covers just a little more than half the volume. The rest of the volume is taken up by Provincial amendments of the parent Stamp Act, with Stamp rules and notifications in force in various Provinces, and other miscellaneous items. It is difficult to see what the purpose can be of printing in full the various Stamp Acts prior to 1899 which have been expressly repealed by the major Act of 1899. The same may be said of

the English Stamp Act, 1891, were it not that the judges in India often quote the corresponding English law relating to stamp duties. The authors have drawn attention to some of the defects of draftsmanship. There is an alphabetical table of cases of English decisions and a useful topical index.

M. I. ZAGDAY.

THE CODE OF CRIMINAL PROCEDURE (Act V of 1898) with a commentary by V. V. CHITALEY and K. N. ANNAJI RAO. (All-India Reporter, Ltd. 3rd edition. 1946. 3 vols. 3628 pp. Rs.36.)

THE INDIAN REGISTRATION ACT (Act XVI of 1908), with a commentary by the same authors and publishers. (1945. 800 pp. Rs.13.)

THE former is a copious and running commentary on each of the 565 sections of the Code of Criminal Procedure. The size of the commentary may be appreciated when it is realised that about five pages of close print are devoted to each section of the Code. The standard of the commentary is tolerably good as is also the print, and practitioners of the Privy Council ought to find this work handy for quick reference. An unbelievable mass of cases is cited in the footnotes. This is due to an unfortunate habit among Indian writers on law who cite cases prolifically and without imagination, irrespective of any intrinsic merit in the cases themselves. There is no judicious selection of cases which lay down a new principle or modify an existing one. In this work there are well over 90,000 citations. Unhappily the table of cases is tabulated not alphabetically but chronologically from 1914 onwards under the names of the courts which have decided them. Other miscellaneous items are packed in, some of which are only remotely relevant. There are given in the schedules, statements of offences under the Indian Penal Code, powers of magistrates, and forms; in the appendix, reports of select committees on various criminal procedure bills, parts of the Government of India and Burma Acts, letters patent and other minor Acts. There is a useful topical index. Since the last edition, which appeared in 1940, there have been, it is true, some minor amendments of some of the sections of the Code and also a number of new cases. But it is questionable if these items really called for an entirely new edition. Could not the commentary have been brought ' up-to-date ' by means of a small supplementary volume rather than by means of what is very largely a repetition of a previous edition?

The authors' commentary on the Registration Act, 1908,

which is for the first time published, is more praiseworthy although one comes across the same technique. All previous Acts relating to registration of documents have been consolidated by the Act of 1908. Since then, there have been minor amendments enacted by the Central and Provincial legislatures all of which are tabulated on pp. 39, 40. The work is an exhaustive account of the Indian law of registration of documents. The authors state the section of the Act to be commented on followed by a synopsis of the commentary and detailed commentary on the points of the synopsis. Reference is easy. Often the résumé of a case is given in the footnotes. Great pains are taken especially over section 17, documents compulsorily registrable, and over section 49, effect of non-registration of such documents. The appendix contains provincial registration rules and relevant extracts from other Acts.

M. I. Zagday.

The National Insurance Act, 1946. By D. Potter, m.a. (London : Butterworth & Co., Ltd. 1946. v and 252 and (index) 14 pp. 21s. net.)

To have brought out a fully annotated edition of this very important Act, only a few months after its passing, is a creditable achievement of both author and publishers. Nor is the commentary confined to references. The General Introduction gives a summary of previous legislation, the Beveridge Report, the subsequent White Paper, and of the principal divergences between these documents and the final Act. It also gives a summary of the recommendations of the Monckton Report on alternative remedies, which has not been implemented yet by legislation. This is followed by a summary of the main provisions of the Act. While this opportunity of a brief systematic survey may be welcomed by many readers, it is little more than a repetition of the Act itself, or of the more detailed notes on the sections. The commentary itself will be found extremely helpful to users of the Act. Wherever possible, it refers to former corresponding statutory provisions, other relevant sections or parallel statutes. A good many sections, however, involve important principles of general law, and here the author has given a fairly full summary and discussion of relevant authorities. Under section 1, for example, there is a good survey of cases defining ' employment ' and ' contract of service '. Section 8, in providing that failure of an employer to pay his contribution under the Act shall not prejudice the insured, ' where the failure to pay is shown not to have been with the consent or connivance of, or

attributable to any negligence on the part of the insured person ', raises the question how far the common law concept of negligence is applicable. As the author points out, it is difficult to conceive a duty of care owed by the employee to his employer to the effect that the employer should stamp the employee's card. Probably, therefore, the word means 'carelessness' in the ordinary sense. Again, section 9 requires definition of 'work under the general control or management of some person other than their immediate employer'. The author here rightly refers to the corresponding problem in the law of Tort (Master and Servant) but fails to mention the leading case of *Century Insurance Co.* v. *Northern Ireland R.T.B.*, [1942] A.C. 509, which emphasises the presumption against lending of a servant to another employer.

As the relative importance of statute law increases, the abstruseness and obscurity of statutory language becomes an increasingly grave problem. The highly important section 43, for example, settling the determination of claims and questions under the Act, is an appalling example. It must be incomprehensible to the intelligent layman and accessible to the lawyer only after many repeated readings. In this and similar cases, the author might well have helped by giving a clearer and simpler version instead of repeating the language of the Act.

This commentary will, no doubt, be widely used in practice. It may be hoped that the many important legal points which will come before the various tribunals established under the Act will be collected in an accessible form and can be utilised in a future edition.

W. FRIEDMANN.

TOPHAM'S REAL PROPERTY. Tenth edition. By His Honour Judge A. F. TOPHAM, K.C. (London: Butterworth & Co. (Publishers), Ltd. 1947. xlii and 455 pp. 21s.)

IT is pleasant to have a new edition of an old friend. 'Topham' is still useful as an introduction to the law of real property and for revision purposes. But is it necessary in 1947 to devote seventeen pages to copyholds (chapter 26)? Surely it would have been better to have used some of this space for a fuller treatment of licences, which is disposed of in about one page (pp. 237–8). The important judgment of the Court of Appeal in *Millenium Productions, Ltd.* v. *Winter Garden Theatre (London), Ltd.*, [1946] 1 All E.R. 678, had been reported before August 1, 1946, and should, it is thought, have been dealt with on pages 237–8. The Australian case of *Bosch* v. *Perpetual Trustee Co.* mentioned in footnote (*pp*), page 28, was decided before our own Inheritance (Family Provisions) Act, 1938, was passed, and there have since been a number of cases showing how our own Act works which should now be cited in preference to the Australian case.

It is not accurate to say that a vesting deed contains any powers '*desired* to be given' in addition to the Settled Land Act powers (p. 43): the deed

must contain particulars of any additional or larger powers *actually* conferred by the trust instrument. The statement in this connection on p. 360 is more accurate. On p. 44 some indication should have been given as to what happens to the legal estate when there is no 'next tenant-for-life'. *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, is too important a case to be omitted. *Re Feversham Settled Estate*, [1938] 2 All E.R. 310, might usefully have been referred to on p. 55 as dealing with the question of what is a principal mansion house. It should have been stated on page 57 that a lease by a tenant for life must contain a covenant for payment of the rent and a condition of re-entry, whilst it would have been more appropriate for '1946' and '1950' to appear in the example on the same page instead of '1936' and '1940', and for twenty-five years to be added to each of the years mentioned in the example given on page 261. The footnote on page 58 could have stated that *Re Chaytor* was approved by the Court of Appeal in *Re Fitzwalter*, [1943] Ch. 285, and the first paragraph on page 72 should indicate that the trustees have to give effect to the wishes of the majority of the beneficiaries 'according to the value of their combined interests'. Section 40, Trustee Act, 1925, also excludes land held under a lease containing a provision against assigning, etc., without licence where such licence is not obtained before the execution of the appointment of new trustees (p. 94).

A reference to section 56 (1), Law of Property Act, 1925, should have been included in footnote (*q*) on page 100, and the words 'and Surrey' inserted after 'Sussex' in footnote (*b*) on page 108, as Croydon is also a compulsory registration area, as stated on page 399.

It may be that the statement on page 146, that the words 'and his issue' if now used in a will will create an estate in fee simple if they would have created an estate tail before 1926 is too definite, (see the articles by Mr. S. J. Bailey and Mr. R. E. Megarry in the 1936 and 1945 issues of the *Cambridge Law Journal*). The outline on page 151 of the duties of a receiver is misleading, as no indication is given that a receiver has to pay all outgoings and to keep down all annual sums and interest due under prior mortgages and his commission, and possibly to pay the cost of all proper repairs, before paying the interest on the debt. *Lemon* v. *Lardeur* is now also reported in [1946] 2 All E.R. 329 (footnote (*gg*), page 262).

In view of, *e.g.*, *Rugby School* v. *Tannahill*, [1935] 1 K.B. 87, it is not correct to say that a lessor must in any case require compensation in damages (see page 270). It is not clear from page 279 that September 1, 1939, is the vital date for a house controlled by the 1939 Rent Restriction Act. The meaning of 'immemorial' should be given on page 291 rather than page 346, and the words 'Middlesex or' should be deleted from footnote (*i*), page 333.

The adoption of these suggestions may or may not make 'Topham' a more useful book, but they are made solely to assist the learned author in that direction.

Should not 'A', line 13, page 81, be 'B'; '100', in the very last line of page 82, '50'; and 'Law of Property Act', line 21, page 157, 'Administration of Estates Act'?

There are singularly few typographical errors. The present reviewer was only able to find the following:—Page 106, footnote (*l*), 'New' should presumably be 'Now'; page 323, line 9, 'surreder' should be 'surrender'; and page 388, line 16, 'convenant' should be 'covenant'.

As the 1925 property legislation is now over 20 years old, should it continue to be referred to as the 'New Acts' (page 91) or 'new law' (page 393)? It may be that 'New' in footnote (*l*), page 106, is not a typographical error!

R. C. F.